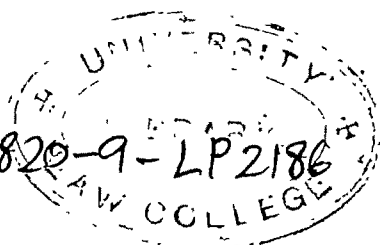


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THE
Allahabad Law Journal.

REPORTS



OF
CASES DECIDED BY THE PRIVY COUNCIL

AND

THE HIGH COURT OF JUDICATURE,

FOR THE NORTH-WESTERN PROVINCES.

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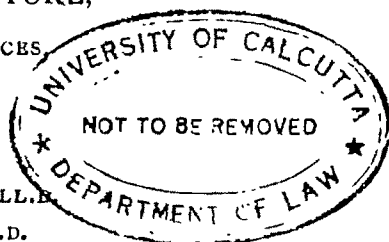
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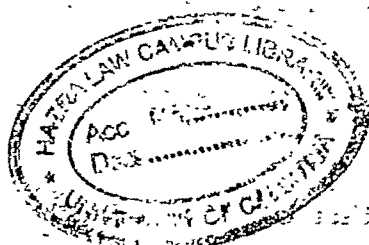


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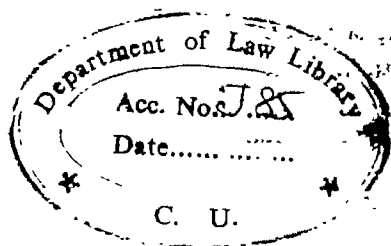
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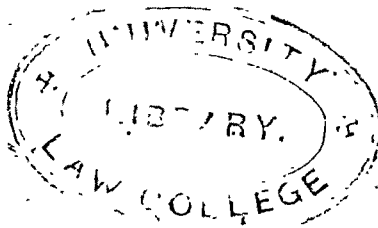
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1912

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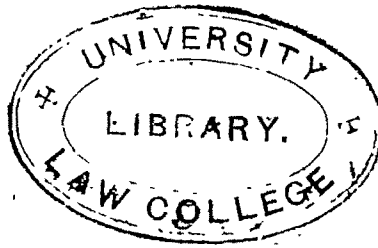
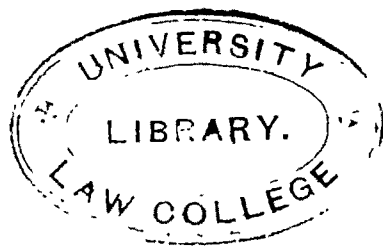


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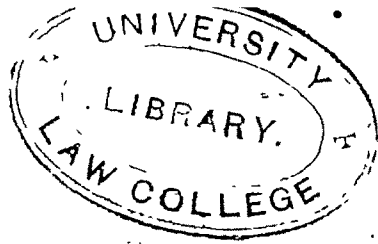


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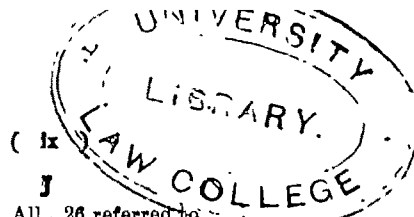
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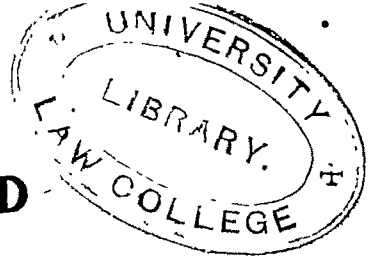
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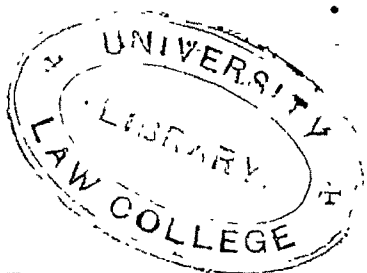
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REPORTS.

HIGH COURT.

JUGGI LAL AND OTHERS

versus

SRI RAM AND OTHERS.*

*Limitation Act (XV of 1877), section 19, Schedule II, articles 110,
116—Acknowledgment—Entries in account books—Suit for rent—
Registered lease.*

CIVIL

1912.

March, 30.

GRIFFIN, J.
CHAMIER, J.

Entries in account books relating to rent of land in suit not signed by the party against whom it is claimed or by his authorised agent do not operate as acknowledgments to save limitation.

A suit for rent accrued due on a registered lease is governed as to limitation by article 110, and not by article 116, of the Second Schedule to the Limitation Act of 1877.

FIRST APPEAL from a decree of Babu Hari Mohan Banerji, Additional Subordinate Judge of Cawnpore.

Suit for recovery of arrears of rent. The facts and arguments appear from the judgment.

Satish Chandra Banerji, for the appellants.

M. L. Agarwala and *Gokul Prasad*, for the respondents.

The judgment of the Court was delivered by

GRIFFIN, J.—This appeal arises out of a suit for arrears of rent based on a registered lease executed on the 1st of December, 1883, and registered on the 31st of December, 1883. The plaintiffs claim six years' arrears. The court below has given them a decree for three years' arrears, holding that the claim for three years is barred by limitation.

Griffin, J.

* F. A. No. 106 of 1911

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The plaintiffs appeal and it is contended that the defendants have made an acknowledgment of their liability which, under the provisions of section 19 of the Limitation Act, operates to save limitation. This acknowledgment is said to be found in the defendant's account books. Extracts of these account books are on the record. They contain certain entries relating to the rent of the land in suit. The plaintiffs, however, have failed to show that these accounts bear the signature of the defendants or their authorised agent. In this respect they have failed to satisfy us that the entries in question operate as an acknowledgment within the meaning of section 19 of the Limitation Act.

It is further contended that the lease being a registered one, they are entitled to sue within six years under article 116. In a similar case decided by Mr. Justice BURKITT, *Ram Narain v. Kamta Singh* ⁽¹⁾, it was decided that article 110 was applicable to a suit of this nature. The learned Judge observed :—"I do not understand why when this article (110) apparently plainly provides for the case now before me, I should go out of my way and hold that article 116 applies." We entirely agree with the view of Mr. Justice BURKITT in the case referred to. We are aware that the question has been decided differently elsewhere, but there has been no unanimity of opinion. Under these circumstances we prefer to follow the decision of our own Court. The appeal is dismissed with costs.

Appeal dismissed.

(1) [1903] I. L. R. 26 All., 138.

FULL BENCH.

DROPADEE

versus

HIRA LAL.*

*Provincial Insolvency Act (III of 1907), section 46 (4)—Appeal—
Extension of time for copy—Limitation Act (IX of 1908), sections
12, 29—Special law.*

The Provincial Insolvency Act, though it applies to a large part of British India, is a special law within the meaning of section 29 of the Limitation Act, as it creates a special jurisdiction and deals with a very special branch of the law.

The general provisions of the Limitation Act are applicable to suits and other proceedings under other Acts which prescribe special periods of limitation, but which are not intended to be complete Codes in themselves, and that the words "affect or alter" relate only to the period prescribed and not to the way in which that period is to be computed.

The general provisions of the Limitation Act are founded mainly upon equitable considerations which apply as much to periods of limitation prescribed by special Acts as to periods of limitation prescribed by the Limitation Act itself.

The Provincial Insolvency Act is not a complete Code in itself. In order to ascertain the procedure to be followed in original, appellate, or revisional proceedings, one has to refer to the Code of Civil Procedure. The object of section 47 appears to be to attract the provisions of the Code of Civil Procedure. There are several Acts, for example, the Succession Act, the Probate and Administration Act, and the Land Acquisition Act, which make the Code of Civil Procedure applicable to proceedings under those Acts and give a right of appeal to the High Court, but do not prescribe any period of limitation for the appeal. It has always been assumed that such appeals are appeals under the Code of Civil Procedure, governed by article 156, schedule I of the Limitation Act, 1908. Section 46 (4) of the Insolvency Act does not seem to have been required, but whether required or not, it does not render the general provisions of the Limitation Act inapplicable.

FIRST APPEAL from an order of Austin Kendall, Esq.,
District Judge of Cawnpore.

* F. A. F. O. No. 154 of 1911.

CIVIL.

1912.

May, 11.

RICHARDS, C. J.

KARAMAT

HUSAIN, J.

CHAMBER, J.

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1912.

Dropadi
v.
Hira Lal.

The facts appear sufficiently from the following order of reference :—

KARAMAT HUSAIN and CHAMIER, JJ.—The question for decision in this and the connected appeal is whether a person filing an appeal under section 46 of the Provincial Insolvency Act is entitled to the benefit of section 12 of the Limitation Act. KNOX and PIGGOTT, JJ., in *Jugal Kishore v. Gur Narain* ⁽¹⁾, held that he is not. In the course of their judgment they say that the only case on the point which they know of, in this Court, is that of *Beni Parsad v. Dukhi Rai* ⁽²⁾. It is evident that their attention was not drawn to the case of *Suraj Bali v. Thomas* ⁽³⁾. They distinguish the decision in I. L. R., 23 All., on the ground that it proceeds upon a *very special line of reasoning*. It seems to us that it proceeds upon two grounds, namely, that section 5 of the Limitation Act does not '*extend or alter*' a period of limitation and that the Rent Act of 1881 could not be considered a complete Code in itself so as to render the provisions of the Limitation Act inapplicable.

The first ground applies generally to all cases of this kind and was so understood by the learned Judges who decided the case in I. L. R., 28 All.

It seems to us that if the decisions in I. L. R., 23 All., and I. L. R., 28 All., are right, the decision in I. L. R., 33 All., must be wrong.

Section 29 (1) (b) of the Limitation Act of 1908 reproduces section 6 of the Limitation Act of 1877. Therefore the construction placed upon section 6 of the Act of 1877 by the Judges that decided the case in 23 All., is not affected by the passing of the Limitation Act of 1908.

We think, that much confusion is likely to result from the conflict between the decision in 33 Allahabad and the earlier decisions in 23 and 28 Allahabad.

We direct that this case be laid before the Hon'ble Chief Justice with a view to its being laid before a larger Bench.

(1) [1911] I. L. R., 33 All., 738.

(2) [1901] I. L. R., 23 All., 277.

(3) [1906] I. L. R., 28 All., 48.

M. L. Agarwala, for the appellant :—

The time spent in obtaining copies of judgment and decree should be excluded in computing the period of limitation for the appeal. The Indian Insolvency Act, it is true, provides for the period of limitation of appeal, but there is nothing to show that the methods of compensation of the period of limitation set out in part 3 of the Limitation Act was to be excluded in computing the period of limitation prescribed by the Limitation Act. The rule set out in section 12 of the Limitation Act only lays down how the period of 30 days is to be calculated when some days had been spent in obtaining copies of judgment and decree. An appeal under the Insolvency Act cannot be filed without a copy of the decree appealed against, and in some cases it would be impossible to file the appeal at all within 30 days. Section 29 of the Limitation Act provides that nothing in that Act would affect or alter any period of limitation prescribed by any special or local law. The Indian Insolvency Act is certainly not a local law, nor is it a special law. In one sense all acts of the Legislature deal with special subjects, and, as such, might be called special law. But the expression '*special law*' means, what in England is known as a private act of Parliament. Moreover, by applying section 12 of the Limitation Act the period of limitation prescribed by the Insolvency Act would remain the same, but in calculating that period certain days would have to be excluded as provided for in that section which is based upon an obvious rule of justice and common sense. He cited the following cases :—

Suraj Bali Pershad v. H. E. Thomas, [1906] I. L. R., 28 All., 48,

Beni Pershad Kuari v. Dharaka Rai, [1901] I. L. R., 23 All., 277.

R. Wall v. J. E. Howard, [1896] I. L. R., 18 All., 215,

Abdul Hakim v. Latifunnisa Khatoon, [1903] I. L. R., 30 Cal., 532,

Khetar Mohan Chakerberti v. Dinabashi Shaha, [1884] I. L. R., 10 Cal., 265.

Nijabuttollo v. Wasir Ali, [1882] I. L. R., 8 Cal., 910.

In re Land Acquisition Act, [1906] I. L. R., 30 Bom., 275.

Gurucharya v. The President of the Belgaum Town Municipality, [1884] I. L. R., 8 Bom., 529.

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Hira Lal,*Gulzari Lal*, for the respondent :—

The Insolvency Act is certainly a special law inasmuch as it deals with the special subject of insolvency, and if this were not a special law, there was no Act in the statute book which would be special law. According to the definition of special law as given in section 41 of the Indian Penal Code, the Insolvency Act is certainly a special law. Moreover, the Insolvency Act by containing a provision for the period of limitation applicable to appeal was intended by the Legislature to be a self-contained enactment.

He cited

Kumara Akkappa v. Sithala Naidu, [1897] I. L. R., 20 Mad., 476.*Jugal Kishore v. Gur Narain*, [1911] 8 A. L. J. R., 833.*Timal Kuari v. Ablakh Rai*, [1876] I. L. R., 1 All., 254.*Girjanath Ray Bahadur v. Patani Bibi*, [1890] I. L. R., 17 Cal., 263.*Nagendranath Mullick v. Mathura Mohan Parihi*, [1891] I. L. R. 18 Cal., 368.*M. L. Agarwala*, heard in reply.

C. A. V.

The judgment of the Court was delivered by

Richards, C. J.

RICHARDS, C. J.—One Ram Narain was declared to be insolvent by the Court of Small Causes, Cawnpore, and the respondent was appointed to be Receiver of his estate. On the application of the respondent, under section 37 of the Provincial Insolvency Act, certain transfers made by the insolvent in favour of the applicant were set aside by an order, dated March 18th, 1911. The applicant presented an appeal to the District Judge on April 26th, 1911. His appeal was within limitation only if he was entitled under section 12 of the Limitation Act to deduct the time spent by him in obtaining a copy of the order of the court of first instance. The District Judge, following the decision of KNOX and PIGGOTT, JJ., in *Jugal Kishore v. Gur Narain* (1), held that the applicant was not entitled to the benefit of section 12 of the Limitation Act. Accordingly he dismissed the appeal. This is an application for revision of the order of the District Judge. It has been treated by the office as a first appeal from an order, but it is an application under the proviso to section 46 (1) of the Provincial Insolvency Act.

(1) [1911] I. L. R., 33 All., 738.

In the course of their judgment in the case cited, KNOX and PIGGOTT, JJ., say that the only case in this Court bearing on the point of which they are aware, is that of *Beni Prasad v. Dharaka Rai* ⁽¹⁾, (the actual reference is to a case reported at page 270 of the same volume, but this was evidently a slip). They distinguished that case on the ground that it proceeded on a very special line of reasoning. It seems to us that the decision of STRACHEY, C. J., and BANERJI, J., in I. L. R., 23 All., 277, proceeded upon two grounds, namely, that section 5 of the Limitation Act of 1877 did not, within the meaning of section 6 of that Act 'affect or alter' a period of limitation prescribed by the N.-W. P. Rent Act of 1881, and that the latter Act could not be considered a complete Code in itself so as to render the general provisions of the Limitation Act inapplicable. KNOX and PIGGOTT, JJ., held that if section 12 of the Limitation Act were applied to an appeal under section 46 of the Insolvency Act, it would within the meaning of section 29 of the present Limitation Act 'affect or alter' the period of limitation prescribed for an appeal under the Insolvency Act. As the language of section 29 of the present Limitation Act, is to all intents and purposes the same as that of section 6 of the Limitation Act of 1877, the decision of KNOX and PIGGOTT, JJ., conflicts with that of STRACHEY, C. J., and BANERJI, J., upon a question of the correct construction of the Limitation Act, which is of considerable importance. It also conflicts with the decisions of BANERJI, J., in *Joti Sarup v. Ram Chander Singh* ⁽²⁾, which was not brought to their notice.

The question has been argued very fully before us, and our attention has been drawn to a large number of decisions bearing upon it. For the applicant it has been contended that the Provincial Insolvency Act is not a 'special law' within the meaning of section 29 of the Limitation Act, and that even if it is a 'special law,' the application of section 12 of the Limitation Act, to the appeal in this case, does not within the meaning of section 29 of that Act 'affect or alter' the period prescribed for an appeal under section 46 of the Provincial Insolvency Act.

(1) [1901] I. L. R., 23 All., 277. (2) [1902] A. W. N., p. 34.

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So far as we are aware, the expression 'special law' has not been defined by the legislature except in the Penal Code, and it is not permissible to use the definition in that Code as a guide to the meaning of that expression in the Limitation Act. It may be that the expression was intended to cover only laws like the Rent Act X of 1859 which was held by the Privy Council to be a complete Code in itself, but it seems more likely that the words were intended to be understood in their ordinary sense as meaning an Act dealing with a particular subject. Even so the expression is not free from difficulty. The Code of Civil Procedure is a general law (See L. R., 3 I. A., 7), though it purports to deal only with procedure. The Forfeited Property Act of 1859 is obviously a special law. But what of such an Act as the Transfer of Property Act? The Registration Act has been held to be a special law, and we think rightly. The Provincial Insolvency Act, though it applies to a large part of British India, appears to us to be a special law as it creates a special jurisdiction and deals with a very special branch of the law. We are of opinion that the Provincial Insolvency Act is a special law within the meaning of section 29 of the Limitation Act.

We think the course of legislation on the subject throws some light upon the true meaning of section 29 of the present Limitation Act. Act XIV of 1859, section 3, provided that when by any law then or thereafter to be in force, a shorter period of limitation than that prescribed by that Act was specially prescribed for the institution of a particular suit, such shorter limitation should be applied notwithstanding that Act; and section 14 of that Act contained provisions similar to those contained in section 14 of the present Limitation Act. While the Act was in force, a question arose whether a suit for rent under Act X of 1859 was governed by Act XIV or not. A Full Bench of the Calcutta High Court answered this question in the negative, see *Poulson v. Modhoosoodun* ⁽¹⁾, and this decision was approved in a later case by their Lordships of the Privy Council who said that the special legislation contained in Act X was of such a special kind that according to the

(1) [1865] 2 W. R. Act X Rulings, p. 21.

well established rule for the construction of statutes, it must be presumed that the legislature did not intend by the general enactment in Act XIV to interfere with it. They pointed out that Act X was intended to form a special and complete Code of Procedure with regard to the trial of questions relating to rent and the occupancy of land in the mufassil (*Unnoda Prasad v. Kristo Coomar* ⁽¹⁾). In accordance with that decision it was held by a Full Bench in *Nagendro Nath Mullick v. Mathura Mohan Parlu* ⁽²⁾ that section 14 of the Limitation Act of 1877 did not apply to suits under Act X of 1859. (See also *Girja Nath Roy v. Patani Bibi* ⁽³⁾).

Section 6 of the Limitation Act of 1871 provided as follows: "When by any law not mentioned in the schedule hereto annexed and now or hereafter to be in force, a period of limitation differing from that prescribed by this Act is especially prescribed for any suits, appeals or applications, nothing herein contained shall affect such law." This was replaced in 1877 by section 6 of the Limitation Act of that year which provided as follows: "When by any special or local law now or hereafter in force in British India a period of limitation is specially prescribed for any suit, appeal or application, nothing herein contained shall affect or alter the period so prescribed." The alteration in the language is noticeable and suggests an intention to limit the operation of special or local laws to the periods prescribed by them and to re-introduce the principle of section 3 of the Limitation Act of 1859 which limited the operation of other Acts to any shorter periods prescribed by them. This seems to have been the view taken in *Behari Lal Mukerji v. Mungolana* ⁽⁴⁾ where section 12 of the Limitation Act of 1877 was held to cover an application for review of judgment in a case under the Bengal Rent Act of 1869 and in *Gopal Chand v. Krishto Chunder* ⁽⁵⁾ where section 5 of the Limitation Act of 1877 was held to apply to a suit under the Bengal Rent Act of 1869. Similarly, in *Nijabutoolla v. Wazir Ali* ⁽⁶⁾, and in *Khetter Mohun v. Dinabashy* ⁽⁷⁾, it was held that

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(1) 15 B. L. R., 60 Note.

(2) [1891] I. L. R., 18 Cal., 368.

(3) [1889] I. L. R., 17 Cal., 263.

(4) [1879] I. L. R., 5 Cal., 110.

(5) [1879] I. L. R., 5 Cal., 314.

(6) [1882] I. L. R., 8 Cal., 910.

(7) [1884] I. L. R., 10 Cal., 265.

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sections 5 and 14 of the Limitation Act of 1877 applied to suits under section 77 of the Registration Act. The last three decisions were approved and followed by the Bombay High Court in *Gurcharya v. President of the Belgaum Town Municipalities* (1). On the strength of three of the Calcutta decisions it was held in a reference under the Madras Forest Act of 1882, I. L. R., 10 Mad., 210, that section 5 of the Limitation Act of 1877 applied to an appeal under that Act, and in *Kullayappa v. Lashmipatti* (2) that section 14 of the Limitation Act of 1877 applied to a suit under the Madras Rent Recovery Act, 1865.

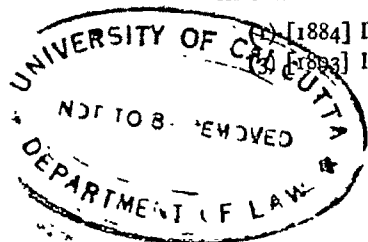
After examining the cases mentioned above and others, MUTHUSAMI AYYAR, J., in *Veeramma v. Abbiah* (3), came to the conclusion that the general provisions of the Limitation Act of 1877 were applicable to suits and other proceedings under Acts prescribing special periods of limitation unless those Acts were complete Codes in themselves to which the general provisions of the Limitation Act could not be applied without incongruity. This view was accepted by STRACHEY, C. J. and BANERJI, J., in *Beni Prasad Kuari v. Dwarka Rai* (4) and by BANERJI, J., in *Joti Sarup v. Ram Chandar Singh* (5). both cases under the N.-W. P. Rent Act, 1881.

There is, therefore, authority for the proposition that the general provisions of the Limitation Act, 1877, are applicable to suits and other proceedings under other Acts which prescribe special periods of limitation but which are not intended to be complete Codes in themselves, and that the words 'affect or alter' in section 6 of the Limitation Act of 1877 relate only to the period prescribed and not to the way in which that period is to be computed. The same words appear in section 29 of the present Limitation Act. It cannot, however, be said that this view has gone unchallenged. SHEPHARD, J., in the case reported in I. L. R., 18 Mad., 99, expressed the opinion that the application of the general provisions of the Limitation Act to periods of limitation prescribed by other Acts did 'alter or affect' those periods and CHANDAVARKAR, J., in a Land Acquisition case in I. L. R., 30 Bom., 275, said it

(1) [1884] I. L. R., 8 Bom., 529. (2) [1889] I. L. R., 12 Mad., 467.

(3) [1893] I. L. R., 18 Mad., 99. (4) [1901] I. L. R., 23 All., 277.

(5) [1902] A. W. N., p. 34.



was a moot question whether the general provisions of the Limitation Act could be applied in this way though he followed a previous decision of the Bombay High Court by which he considered himself bound.

The question is one of considerable difficulty, and it must be admitted that at first sight it is straining the words to hold that the application of the general provisions of the Limitation Act to periods of limitation prescribed by other Acts does not 'affect or alter' those periods. In one sense it certainly does. But the construction accepted by STRACHEY C. J., BANERJI, J., and MUTHUSAMI AYYAR, J., seems to us to be correct. Apart from the history of this piece of legislation we find it difficult to believe that when the legislature introduced, as it has, into several Acts, provisions giving a right of appeal and prescribing periods within which the right may be exercised, it intended as a general rule that those provisions should be applied without reference to the general provisions contained in the general Limitation Act. In many, if not most, cases the Code of Civil Procedure is made applicable with the result that an appellant must produce a copy of the order against which he is appealing. It is reasonable to suppose that the legislature intended to give him time to procure a copy of the order. The general provisions of the Limitation Act are founded mainly upon equitable considerations which apply as much to periods of limitation prescribed by special Acts as to periods of limitation prescribed by the Limitation Act itself.

Upon the question whether this or that Act is a complete Code in itself to which the Limitation Act should not be applied, there is considerable difference of opinion. In some of the cases already cited, the Calcutta High Court held that the general provisions of the Limitation Act, 1877, were applicable to suits under the Registration Act. But in *Veeramma v. Abbiah* ⁽¹⁾ three Judges held that they did not apply and that decision was followed in *Abdul Hakim v. Latif-un-nissa* ⁽²⁾. In *Suraj Bali v. Romai* ⁽³⁾, it was held that section 5 of the Limitation Act, 1877, did apply to a suit under the Registration Act. It is unnecessary to express

(1) [1893] I. L. R., 18 Mad., 99. (2) [1903] I. L. R., 30 Cal., 532.

(3) [1906] I. L. R., 28 All., 48.

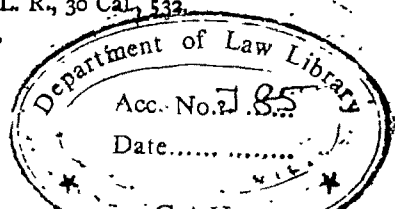
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any opinion on this point, but the soundness of one of the reasons given for holding that the general provisions of the Limitation Act do not apply to suits under the Registration Act, namely, that a suit to compel registration of a document might be delayed for many years under section 7 of the Limitation Act of 1877 (section 6 of the present Act), is open to question, for that section applies only to suits the period of limitation for which is prescribed by the schedule. The same reason was given by KNOX AND PIGGOTT, JJ., for holding that the general provisions of the Limitation Act did not apply to proceedings under the Insolvency Act.

There remains the question whether the Provincial Insolvency Act is a complete Code in itself. In our opinion, it is not. In order to ascertain the procedure to be followed in original, appellate or revisional proceedings, one has to refer to the Code of Civil Procedure. It appears to us that the object of section 47 of the Act was to attract the provisions of the Code of Civil Procedure. There are several Acts, for example, the Succession Act, the Probate and Administration Act, and the Land Acquisition Act, which make the Code of Civil Procedure applicable to proceedings under the Act and give a right of appeal to the High Court, but do not prescribe any period of limitation for the appeal. It has always been assumed, probably rightly, that such appeals are appeals under the Code of Civil Procedure, governed by what is now article 156 of Schedule I to the Limitation Act and by the general provisions of the Act also. Sub-section 4 of section 46 of the Provincial Insolvency Act does not seem to have been required, but whether it was required or not, we do not think that it can have been inserted for the purpose of rendering the general provisions of the Limitation Act inapplicable.

For the above reasons, we are of opinion, that section 12 of the Limitation Act applied to the appeal presented by the present applicant to the District Judge. In this view, the appeal was within time. We set aside the order of the District Judge, and remit the case to him to be disposed of according to law. Costs in this Court, to be costs in the cause.

Appeal allowed.

BHOLE SINGH
versus
 BHAGWANT SINGH. *

CIVIL

1912.

May, 4.

PIGGOTT, J.

Limitation Act (Act IX of 1908), articles 138, 142, 144—Execution of decree—Formal possession—Effect as against a person other than the judgment debtor.

Defendant held three mortgages on a certain property. He brought three successive suits upon them. In execution of his decrees upon two of them he purchased the property himself on February 21, 1898, and obtained formal possession on September 7, 1898, and again, on January 30, 1899. In execution of his third decree the property was purchased by the plaintiff on April 21, 1898. This sale was confirmed on May 30, 1898, and formal possession was delivered to the plaintiff on May 15, 1899. The plaintiff instituted the present suit for possession on June 1, 1910, on the allegation that on May 15, 1899, he had obtained actual possession and was subsequently dispossessed in July, 1899. *Held*, that the suit was governed by either article 138 or article 142 of the first schedule to the Limitation Act and not by article 144, and that in either case it was barred by limitation.

SECOND APPEAL from a decree of Pandit Girraj Kishore Datt, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Agra, confirming a decree of Babu Lakshmi Narain, Munsif of Fatehabad.

The facts, briefly, were as follows :—The property in suit was mortgaged by one Nande to the appellant by three successive mortgage deeds. Three separate suits were brought to enforce the three mortgages, each resulting in a decree for sale. There were three auction sales in execution : two on 21st February, 1898, at which the appellant was the purchaser, and the third on 21st April, 1898, at which the respondent was the purchaser.

The appellant obtained possession of the property on 7th November, 1898, and 30th January, 1899, respectively. The sale to the respondent was confirmed on 30th May, 1898, and formal possession was delivered to him on 15th May, 1899. The appellant applied for mutation of names, and was opposed by the respondent. The Revenue Courts

* S. A. No. 812 of 1911.

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decided in favour of the appellant and effected mutation in his favour. The respondent brought a suit against the appellant, on 18th June, 1910, for declaration of ownership and for possession. It was alleged that his possession had been put an end to in consequence of the order of the Revenue Court effecting mutation in favour of the appellant. The defence was that the suit was barred by limitation, and that the respondent had purchased nothing ; for, on the date of his purchase, the judgment-debtor, Nande, had no saleable interest left in the property. Both the lower courts held that the suit was not barred by limitation and that the appellant was estopped from denying the title of the respondent. Hence this second appeal to the High Court.

Damodar Das, for the appellant :—The suit is barred by time. The article applicable is article 138 of the first schedule to the Limitation Act. At the date of the auction sale in favour of the respondent, the judgment-debtor was in possession, for it was not till later that the appellant obtained possession by virtue of his purchases. The starting point for the period prescribed by article 138 in a case where the judgment-debtor was in possession at the date of the sale is the date when the sale becomes absolute ; and the present suit was brought more than 12 years after that date. I rely on the rulings in

Sadashiv Bin Mahadu v. Narayan Vitthal, [1911] I. L. R., 35 Bom., 452.

Venkatalingam Verasami, [1893] I. L. R., 17 Mad., 89

The case of

Narain Das v. Lalta Prasad, [1899] 19 A. W. N., 56,

which was relied upon by the opposite party in the lower courts, is in my favour.

Uma Shankar Bajpai, for the respondent :—Article 138 does not apply to this case ; for the respondent had obtained at least formal possession under his purchase. Actual possession is to be presumed in his favour. He was dispossessed in consequence of the order of the Revenue Court, and the article applicable to the suit is article 144. The suit is within 12 years of the date of dispossession. The rulings relied on by the appellant are distinguishable on the ground of the

conduct of the appellant by which he is estopped from denying the title of the respondent of obstructing his claim. The position of the appellant is very materially altered by this circumstance.

[PIGGOTT, J.—But you have to show first that the suit is within time. The question as to whether the appellant is estopped from denying your claim will arise only after it is found that the suit is not barred by limitation.]

Damodar Das, was not heard in reply.

The judgment of the Court was delivered by

PIGGOTT, J.—This was a suit for recovery of possession over certain immoveable property, and the only question for determination before me is one of limitation. In stating this question, I think it reasonable to accept everything which the courts below have found against the conduct of the defendant upon the facts of the case. It appears that the defendant, holding three distinct mortgages on the property in suit, brought three distinct suits, one upon each mortgage. He obtained decrees and put the property up for sale three times, once upon each decree. He purchased himself at auction under two of his decrees on the 21st of February, 1898, and obtained formal possession on the 7th of September, 1898, and again on the 30th of January, 1899. In the meantime the same property had been put up for sale a third time on April the 21st, 1898. The defendant appeared at that auction sale, said nothing about his previous purchase, but actually bid for the property as if it still belonged to his judgment-debtor. He was outbid by the plaintiff, who thus became auction-purchaser at this third sale held on April the 21st, 1898. This sale was confirmed by the court on the 30th of May, 1898, and the plaintiff obtained formal delivery of possession on the 15th of May, 1899. It must be remembered, therefore, that his judgment-debtor was still in possession at the date of the auction sale, but the decree-holder (the present defendant), as auction purchaser under his first two decrees, had himself obtained formal delivery of possession before the plaintiff did so. The present suit was brought on the first of June, 1910, and I have to determine which is the article of the

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first schedule to the Indian Limitation Act (Act IX of 1908), by which that suit is governed. The suit as brought is one to which article 142 of the said schedule would apply, provided the plaintiff succeeded in establishing the necessary facts. What the plaintiff says is that he obtained actual, and not merely formal possession on the 15th of May, 1899, but lost that possession sometime in the month of July, 1899, owing to an adverse decision of the Revenue Courts. If these facts were established, the suit would be one for possession of immoveable property when the plaintiff while in possession of the property, had been dispossessed; article 142 of the Indian Limitation Act would apply; the date of the origin of the cause of action would be the month of July, 1899, and the suit would be within time. In such a suit, however, the burden of proof is on the plaintiff to satisfy the court that he was actually in possession within limitation. There is no finding in favour of the plaintiff by either of the courts below on this point, nor has either of them applied article 142 of the schedule, nor has either of them calculated the origin of the cause of action from the month of July, 1899. Both the courts below have held that the plaintiff has a cause of action dating from the 15th of May, 1899, the date on which formal delivery of possession to him took place under orders of the court. The learned Munsif himself does not expressly state what article of the Limitation Act he proposes to apply; but the learned Subordinate Judge on first appeal has expressly applied article 144. This article cannot be applied unless the court is prepared to find that the suit is one for possession of immovable property not specially provided for under any of the other articles of the schedule in question. This seems to me clearly impossible because the suit as framed is one to which article 142 would apply, and it discloses facts which would make article 138 of the schedule applicable. The courts below have held that this article 138 of the schedule is excluded by the principle of the ruling of this Court in *Narain Das v. Lalta Prasad and others* (1). That ruling obviously does not exclude article 138, because the particular case then before the court was decided

(1) [1899] A. W. N., p. 56.

without any determination of the question whether article 138 or article 144 would have applied to the facts then before the court. By implication it seems to me that this ruling is entirely against the plaintiff; but I will refer to this point again presently. There are other authorities for holding that article 138 of the schedule would apply to the present suit, as for instance, cases reported in I. L. R. 35 Bom., 452, and in I. L. R., 17 Mad., 89. I come back, therefore to what seems to me the one question really arguable, namely, whether or not the courts below should have found in favour of the plaintiff on the ground that he has made out a sufficient case for applying the article of Limitation Act on which his suit was actually based, namely, article 142. I do not think the case for the plaintiff can be put any higher than this, namely, that the court should accept his certificate of formal delivery of possession on the 15th of May, 1899, as *prima facie* sufficient proof that he obtained actual possession on that date. If this proposition can be affirmed, then it would not be necessary for the plaintiff to prove that he actually lost possession in the month of July following, or on any specific date; he could claim to have made out a good title, *plus* possession within twelve years of the date of the suit. Now it is on this very point that the ruling in Weekly Notes, 1899, already referred to, seems to me against the plaintiff. Applying the principle involved in that ruling to the facts of the present case, I hold that if the judgment-debtor had been in actual possession on the 15th of May, 1899, then the court would have been bound to accept the plaintiff's certificate as sufficient proof that the judgment-debtor was actually ousted from possession on that date, and that possession passed to the plaintiff. The case is otherwise when the judgment-debtor was not in possession on the 15th of May, 1899, but another person was in possession as auction-purchaser under a previous sale. As against such auction-purchaser formal delivery of possession to the present plaintiff is not proof that he was actually ousted. Something has been said before me in argument as to the dishonesty of the defendant's proceedings, and as to the question of estoppel. The considerations are quite irrelevant to the question of limitation. If the plaintiff

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had come into court within twelve years of the date of the confirmation of his auction sale, it may be that the courts below are perfectly right in holding that no sort of defence on the merits would have been open to the defendant, in view of his proceedings, and particularly in view of the fact that he was a bidder at the auction sale of the 21st April, 1898. The whole point of the law of limitation is, however, that a defendant cannot be put to the defence of his title at all unless the plaintiff claims from the courts the relief to which he is entitled within what the legislature has laid down to be a suitable time with reference to the facts of each particular case. I hold that the suit as framed is barred by article 142 of the first schedule to the Indian Limitation Act, because the plaintiff has failed to prove the ingredient necessary to bring his suit under the operation of that article. I hold that the facts disclosed are such that the suit would have been maintainable under article 138 of the same schedule if it had been filed two days earlier, but that it is barred under that article, because it was brought more than twelve years from the date of the confirmation of the auction sale. I hold that article 144 of the same schedule cannot be applied at all, because from any point of view the suit is one provided for by another article in the same schedule. I, therefore, accept this appeal, and, setting aside the decrees of both the courts below, dismiss the suit with costs throughout.

B. K. M.

Appeal allowed.

MUHAMMAD AKHTAR HUSAIN KHAN AND OTHERS

versus

TASADDUK HUSAIN.*

CIVIL.

1912.

May, 10.

Partition—Appeal against preliminary decree—Final decree passed during pendency of appeal—Cross-objections filed against final decree—Appeal against preliminary decrees maintainable.

RICHARDS, C. J.

BANERJI, J.

During the pendency of an appeal preferred by the plaintiff against a preliminary decree in a partition suit, the court of first instance passed the final decree. The defendant filed an appeal against the latter and the plaintiff filed cross-objections. The lower appellate court dismissed the plaintiff's appeal inasmuch as he had not appealed against the final decree and that of the defendant as he had not appealed against the preliminary decree.

Held, that the plaintiff having filed cross-objections against the final decree it was *sub judice* when the plaintiff's appeal against the preliminary decree came on for hearing, and consequently the plaintiff's appeal was not barred.

Per RICHARDS, C. J.—The final decree depends upon the preliminary decree, and that if an appeal is taken to the preliminary decree and succeeds, the final decree necessarily falls with the reversal of the preliminary decree upon which it depends.

Kuriamal v. Bishambhar Das, [1910] I. L. R., 32 All., 225, and

Narain Das v. Balgobind [1911] 8 A. L. J. R., 604, distinguished.

APPEAL under section 10 of the Letters Patent from a judgment of Mr. Justice PIGGOTT, confirming a decree of E. M. Nanavuty, Esq., Additional Judge of Barielly, who confirmed a decree of the Subordinate Judge of Bareilly.

The facts appear from the judgment of

PIGGOTT, J.—The question raised by this second appeal is a somewhat curious one. In a suit for partition a preliminary decree was passed on the 19th of December, 1907. On the 1st of February, the plaintiffs in the suit preferred an appeal against the said decree. They neglected, however, to ask the appellate court for any order staying proceedings in the court of first instance during the pendency of this

* L. P. A. No. 97 of 1911,

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appeal. The result was that the appeal was still pending when, on the 10th of March, 1908, the first court proceeded to pass a final decree. Against this decree the defendants appealed, while the plaintiffs later on put in a memorandum of cross-objections under Order 41, Rule 22 of the present Code of Civil Procedure. In this petition the plaintiffs did not raise any of the points which they had taken in their memorandum of appeal against the preliminary decree, but merely objected to certain matters which had been determined by the final decree alone. I have just held in a connected appeal by the defendants that this appeal of the said defendants against the final decree was maintainable, and have remanded that case to the lower appellate court for a decision both on the appeal and on the cross-objections. What I have now to decide is simply whether the plaintiffs' appeal against the preliminary decree of the 19th December, 1907, is maintainable, in view of the fact that these plaintiffs have not appealed against the final decree passed on the 10th of March, 1908. It is contended that the present case is distinguishable from that decided by this Court in I. L. R., 32 All., 225, because in the present case the appeal was filed before the final decree had been passed. I find myself unable to draw any distinction of principle on this ground. The reasons given in the above reported case for not entertaining an appeal against a preliminary decree unless the final decree is also challenged, do not seem to me to be affected by the circumstance that there was no final decree in existence at the moment when the appeal against the preliminary decree was filed. This view was taken by a Bench of this Court in F. A. No. 3 of 1910, decided on the 21st of March, 1911. I have pointed out that the plaintiffs could have protected themselves either by obtaining a stay order from the appellate court, or by repeating in their memorandum of cross-objections the grounds on which they had challenged the preliminary decree in their appeal against the same. Even now it is open to the lower appellate court, if it is satisfied that the plaintiffs have acted in good faith, to admit a further memorandum of cross-objections, or to permit amendment of the memorandum already presented so as to meet the difficulty in which the plaintiffs find themselves. The appeal now before me must, in my opinion, fail. It is, accordingly, dismissed with costs,

On appeal under Section 10 of the Letters Patent,

Sundar Lal and *S. A. Haidar*, for the appellant.

Satish Chandra Banerji, for the respondent.

The following judgments were delivered :—

RICHARDS, C. J.—This appeal arises under the following circumstances. The suit was one for partition. A preliminary decree was made on December 19, 1907. The plaintiffs preferred an appeal within time against this preliminary decree. Before the appeal was decided, however, a final decree was made on March 10, 1908. The defendant preferred an appeal against the final decree, and the plaintiff filed cross-objections under Order 41, Rule 22. The two appeals then came before the lower appellate court. It dismissed the plaintiff's appeal on the ground that he had not appealed from the final decree, and it dismissed the defendant's appeal upon the ground that he had not appealed against the preliminary decree. Both parties appealed to this Court, and our learned brother set aside the decree of the lower appellate court, dismissing the defendant's appeal and remanding the case to be heard on its merits. He, however, dismissed the plaintiff's appeal on the ground that he ought to have appealed against the final decree. Reliance was placed upon the ruling of *Kuriamal v. Bishambhar Das* ⁽¹⁾ and also on the case of *Narain Das v. Balgobind* ⁽²⁾. The facts in the present appeal are not identical with the facts in either of the two rulings relied on. The final decree never became final. The defendant had appealed against it, and the plaintiff had filed cross-objections. It was, therefore, *sub judice* when the appeal of the plaintiff from the preliminary decree came on for hearing. The case of *Kuriamal v. Bishambhar Das* was like the present, a case which arose before the present Code of Civil Procedure came into operation. The case of *Narain Das v. Balgobind* was one to which the provisions of the present Code were applicable. The decision in the latter case seems to me to have rested entirely upon the ruling in *Kuriamal v. Bishambhar Das*. Section 97 of the Code of Civil Procedure provides as follows :—
“Where any party aggrieved by a preliminary decree passed

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(1) [1910] 1 L. R., 32 All., 225 (2) [1911] 8 A. L. J. R., 604.

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after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree." It seems to me that this section shows that the proper mode of challenging the correctness of the preliminary decree is an appeal against that decree. I can see no reason why a party should be called upon to appeal against the final decree and to incur the expense of so doing merely to keep the other appeal alive. It may well be that the party has no objection to the final decree in itself and that his sole objection is to the preliminary decree. In many cases the party would admit that if the preliminary decree is confirmed, the final decree is correct. It seems to me also, that the final decree depends upon the preliminary decree, and that if an appeal is duly taken to the preliminary decree and succeeds the final decree necessarily falls with the reversal of the preliminary decree upon which it depends. I would allow this appeal.

Banerji, J.

BANERJI, J.—I have also arrived at the same conclusion. The ground upon which the appeal of the plaintiffs was dismissed by the lower appellate court, was that they had not appealed from the final decree passed by the court of first instance. That court overlooked the fact that at the time when the appeal of the plaintiffs came on for hearing, there was pending in that court an appeal preferred by the defendants in which objections had been taken by the plaintiffs, so that at the time of the hearing of the appeal of the plaintiffs from the preliminary decree, the final decree was *sub judice* and had not become final. That circumstance distinguishes this case from the two rulings on which the learned Judge of this Court has relied and which have been referred to by the learned Chief Justice. In the first of those cases no appeal had been preferred from the final decree, and in the latter of them the period of appealing from that decree is said to have expired when the appeal from the preliminary decree was filed. That is not the case here. Therefore, there was no reason for not entertaining the appeal preferred by the plaintiffs from the preliminary decree passed by the court of first instance. I also would allow the appeal.

BY THE COURT.—The order of the Court is that the decrees of the court below and of this Court are set aside, and the case is remanded to the lower appellate court with directions to readmit it under its original number in the register and to hear and decide it on its merits. Costs here and heretofore will be the costs in the case. The record may be sent back, as soon as possible, to enable the lower appellate court to dispose of the appeals of both parties at an early date.

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GANESH PRASAD

versus

DAMODAR DAS AND OTHERS.*

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1912.

May, 13.

CHAMIER, J.
PIGGOTT, J.

*Code of Civil Procedure (Act V of 1908), Schedule II, paras. 5 (2), 8—
Reference to arbitration—No order superseding arbitration—Jurisdiction of court.*

A dispute was referred to arbitration appointing two arbitrators and an umpire. The notices issued to the umpire and one of the arbitrators were returned unserved. The court, while issuing notices to the arbitrators, had passed the order that if no award was filed within the period fixed, the parties were to be in attendance with their witnesses prepared to proceed with the case. No award was filed within the prescribed period, and the Subordinate Judge dismissed the suit: *held*, whether the order passed by the Subordinate Judge amounted to a dismissal for default or a decision against the plaintiff on the merits it was made without jurisdiction, having been passed in the absence of a proper order superseding the arbitration before the court proceeded to dispose of the case.

FIRST APPEAL from a decree of Munshi Harbandhan Lal
Additional Subordinate Judge of Gorakhpur.

The facts of the case appear from the judgment.

W. Wallack and Gobind Prasad, for the appellant.

Sital Prasad Ghosh, for the respondents.

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Chamier, J.

The judgment of the Court was delivered by

CHAMIER, J.—When this appeal first came up for hearing, a preliminary objection was taken to the effect that the order complained of was in substance, if not in form, an order dismissing the suit for default, and that no appeal lay. Notice was accordingly issued to the defendants-respondents to show cause why this Court should not take up the matter in the exercise of its revisional jurisdiction. We have to-day heard both parties, and we consider it unnecessary to discuss or to determine the question whether an appeal does or does not lie. We are satisfied that if an appeal does not lie, the order of the court below is liable to be set aside in revision as having been passed without jurisdiction. The position was this. The parties had referred the matter in dispute to arbitration and had named two arbitrators and an umpire. For some reason or other, the notices issued by the court to the umpire and to one of the arbitrators were returned unserved. The remaining arbitrator had expressed his willingness to act, but the parties not unnaturally failed to appear before him as they had never agreed to abide by his sole decision. It seems to us that no case had arisen falling within the provisions of paragraph 5 of Schedule II of the Code of Civil Procedure. The court below might have fixed a further date and might have made another effort to serve the notices in question; or it might have dealt with the matter as falling within the provisions of paragraph 8 of Schedule II, aforesaid. It seems to us that it would not have been unreasonable to hold that the arbitrator and the umpire were unable to complete the award within the time specified by the court, and that the court saw no cause under the circumstances to allow further time for making the award. In that case an order might have been passed superseding the arbitration, and the court might have then proceeded with the suit. As a matter of fact, the learned Subordinate Judge referred to no provisions of the Code of Civil Procedure at all. He never passed any order superseding the arbitration. What he did was that on a previous date, when issuing notice to the arbitrators, he informed the parties that if no award was filed within the period fixed by the court, they were to be in attendance with their witnesses, prepared to proceed with

the case. We think that a hypothetical order of this sort should not have been passed, and in any case it does not supply the deficiency we have noted, namely, the absence of a proper order superseding the arbitration before the court proceeded to dispose of the case. Under the circumstances it seems to us the order dismissing the plaintiff's suit, whether it be regarded as an order dismissing the suit for default or as a decision against the plaintiff on the merits, on the ground of his failure to prove his case, was certainly an order passed without jurisdiction. We, accordingly, set aside the order in question and the decree of the court below, and direct the learned Subordinate Judge to readmit the suit on his file and to proceed with it according to law. Costs will abide the event.

Appeal allowed.

PIARE LAL AND OTHERS

versus

MAKHAN AND OTHERS.*

Mortgage—Unregistered receipt given acknowledging payment—Whether such receipt admissible in evidence.

A receipt was given in the following terms: "The bond is returned. No money remains due." The receipt was unregistered. In a suit upon a mortgage the mortgagor produced the receipt alleging payment in full: *Held*, that the receipt, though unregistered, so far as it related to the payment of the entire sum of the money due on the mortgage on the date of the receipt, was admissible in evidence, and the words "no money remains due" did not purport to extinguish the mortgage.

SECOND APPEAL from a decree of C. E. Guiterman, Esq., Additional Judge of Meerut, reversing a decree of Munshi Muhammad Husain, Additional Subordinate Judge.

Facts of the case appear from the judgment.

Nihal Chand and *Benode Bihari*, for the appellants.

Sundar Lal and *Vishun Ram Mehta*, for the respondents.

The judgment of the Court was delivered by

KARAMAT HUSAIN, J.—This was a suit upon a mortgage. One of the pleas in defence was payment of the entire sum due on it. In support of that plea a receipt, dated Asadh Sudi 3rd, Sambat 1950, corresponding to 16th June, 1893, was

* S. A. No. 760 of 1911.

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Chamier, J.

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produced. The court of first instance came to the conclusion that the receipt was not proved and that the payment was not proved. It, therefore, decreed the claim. There was an appeal to the lower-appellate court which found that the receipt was genuine, and reversed the decree of the first court. The plaintiffs have preferred a second appeal to this court, and two points are pressed before us. The first is that there is nothing in the receipt and in the oral evidence adduced by the defendants to establish that the receipt refers to the mortgage which is the basis of the suit. The second is that the receipt purports to extinguish the right in the mortgaged property, and that as it is unregistered, it is inadmissible in evidence. The receipt is to the following effect:—"The bond is returned. No money remains due." The defendants adduced oral evidence to establish that on the day on which the receipt was executed, the sum of Rs. 275 was paid. The lower appellate court has believed that evidence.

Regarding the plea that the receipt does not show that the bond in dispute was paid up, we are of opinion that this is entirely a new point which was not raised either in the first court or in the court of first appeal, and as it raises a question of fact, we are not inclined to give the appellants an opportunity to have that point tried *de novo* at this stage of the litigation.

On the second point, having regard to the cases, *Dalip Singh v. Durga Prasad* ⁽¹⁾, *Imdad Husain v. Tasudduk Husain* ⁽²⁾, *Jiwan Ali Beg v. Basa Mal* ⁽³⁾, *Sri Ram v. Kesri Mal* ⁽⁴⁾, *Faki v. Khotu* ⁽⁵⁾, and *Lakshman v. Damodar* ⁽⁶⁾, and the express wording of section 17, clause (2), sub-clause (xi) of the Indian Registration Act No. XVI of 1908, we are of opinion that the receipt, though unregistered, so far as it relates to the payment of the entire sum of the money due on the mortgage on the date of the receipt, is admissible in evidence, and the words "no money remains due" do not, in our opinion, purport to extinguish the mortgage. That being so, the receipt does not require registration. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

(1) [1876-78] I. L., R. 1 All., 442.

(2) [1884] I. L., R. 6 All., 335.

(3) [1884] I. L., R. 9 All., 108.

(4) [1887] I. L., R. 18 All., 338.

(5) [1882] I. L., R. 4 Bom., 550.

(6) [1902] I. L., R., 24 Bom., 609.

JAGGU AHIR

versus

MURLI SHUKUL.*

Criminal Procedure Code (Act V of 1898), sections 145, 526—"Criminal case", meaning of—High Court's power to transfer.

CRIMINAL,

1912.

May, 8, 16.

KARAMAT
HUSAIN, J.
TUDBALL, J.

In the absence of anything to the contrary every case over which a criminal court exercises jurisdiction under the Criminal Procedure Code is a *criminal case* for the purposes of that Code. The expression 'criminal case' in section 526 includes a proceeding initiated under section 145 of the Code and that the High Court under section 526 has power to transfer it from one court to another court subject to all the conditions under which a transfer can be made.

An 'accused person' is one over whom a criminal court exercises jurisdiction.

In re Pandurang Govind Piyari, [1900] I. L. R., 25 Bom., 179, not followed.

The applicant applied for the transfer of a criminal proceeding instituted under section 145 of the Criminal Procedure Code. On the application coming on for hearing before PIGGOTT, J., a preliminary objection was raised by the opposite party that the High Court had no power to transfer criminal proceedings under section 145 of the Criminal Procedure Code. PIGGOTT, J., referred the point to a bench of two Judges. The matter then came on before KARAMAT HUSAIN and TUDBALL, JJ.

S. K. Dar (for *Binode Behari*), for the applicant: This Court has power to transfer all cases pending in inferior criminal courts. Section 526 is very wide and gives this Court power to transfer on sufficient grounds, any '*criminal case*.' It is not necessary that an offence should have been committed before the matter could be called a '*criminal case*.' A criminal case is one which is tried by a criminal court. The Bombay case proceeded upon the erroneous assumption that it was necessary to constitute a criminal case, that an offence should have been committed.

* Cr. Mis. No. 52 of 1912.

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The cases cited are all referred to in the judgment.

M. L. Agarwala, for the opposite party:—There is a material difference in the wording of the section conferring on District Magistrates power to transfer cases and of the section conferring such power on the High Court. In section 526 the words "*criminal case*" are used, whereas in section 528 the word '*case*' is used. It is obvious, therefore, that the legislature intended to discriminate between a '*case*' and a '*criminal case*'. Every proceeding would, of course, be a *case*; but would not necessarily be a '*criminal case*'. The reason for the distinction is obvious. Proceedings under section 145 and cognate sections are proceedings taken to prevent the commission of offences, and the District Magistrate as head of the district, is responsible for the maintenance of its peace. He, as the person on the spot, is best able to decide whether the exigencies of public peace would allow of the delay involved in transfer proceedings. It could never have been the intention of the legislature to allow such proceedings to be indefinitely postponed or delayed, while questions of academical importance were being discussed in this Court. The mischief which these proceedings were intended to prevent, would be perpetrated during the time that the transfer proceedings remained pending.

S. K. Dar, heard in reply.

The judgment of the Court was delivered by

*Karamat
Husain J.*

KARAMAT HUSAIN, J.—The question referred to us is whether the High Court has jurisdiction under section 526 of the Code of Criminal Procedure or under the Letters Patent (especially by section 22) to transfer from the court of one Magistrate to the court of another Magistrate a proceeding under section 145 of the Code of Criminal Procedure. There is a conflict of authority on the point. *In re Pundurang Govind Piyari* (1) it was held that the High Court had no power under section 526 of the Code to transfer a proceeding under section 145 of the Code from one court to another. The reason given is that such a proceeding is not a "*criminal case*" within the meaning of section 526, that a criminal case means a case arising out of and dealing

(1) [1900] I. L. R., 25 Bom., 179.

with *some crime already committed* and does not include proceedings taken for the presentation of a crime. The Madras High Court in *Arumuga Tegundan* ⁽¹⁾ dissented from the Bombay case. The learned Judges said:—"We have no doubt of our power to transfer this case both under section 526 of the Code of Criminal Procedure and clause 29 of the Letters Patent. If a case under section 145 of the Code of Criminal Procedure is not a "criminal case", it is difficult to conceive what it is. With all respect we are unable to agree with the decision of the Bombay High Court *in re Pundurang Govnd Piyari*." In *Lalit Mohan Moitra v. Surja Kanta Acharjee* ⁽²⁾, GHOSE, J., held as follows:—

"An investigation under section 145 of the Code of Criminal Procedure is an inquiry within the meaning of clause (a) of section 526 of that Code.

"A Magistrate trying a case under section 145 is a criminal court within the meaning of the Code.

"The expression 'criminal case' in section 526 means a case over which a Criminal Court has jurisdiction."

It is doubtful whether the High Court has power under section 526 to transfer cases other than those in which a person is charged with an offence. The High Court may, under section 15 of the Charter Act, transfer a case under section 145.

TAYLOR, J., held as follows:—"The expression 'case' and 'criminal case' are not co-extensive. The phrase 'criminal case' is used in a limited sense and does not apply to every case cognizable by a Criminal Court. It is doubtful whether the High Court has power under section 526 to transfer cases which do not relate to matters which may strictly be described as criminal as relating to a crime or offence under the law. The power, however, exists under section 29 of the Letters Patent wherein the phrase 'criminal case' appears to be used without the distinction which apparently exists in the Criminal Procedure Code in respect of cases tried by a Criminal Court as opposed to civil cases."

(1) [1902] I. L. R., 26 Mad., 188.

(2) [1901] I. L. R., 28 Cal., 709,

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In *Gurudas Nag v. Gaganendra Nath Tagore* (1) RAMPINI and MOOKERJI, JJ., held that a proceeding under section 145 of the Code of Criminal Procedure was a "criminal case" and expressly dissented from *in re Pundurang Govind* (2). Our answer to the question turns upon the meaning we give to the phrase "criminal case" in section 526 of the Code of Criminal Procedure. There is nothing in the section to lead us to infer that the phrase means a "criminal case arising out of an offence which has already been committed." Had that been the intention of the legislature, it could have easily expressed it in apt words and would not have used an expression of a larger connotation. We are of opinion, that it includes proceedings taken under section 145 for the prevention of a crime.

A Magistrate who conducts those proceedings does so as a criminal court under the provisions of the Code of Criminal Procedure, and it cannot be said that he performs the function of an executive officer.

The expression "criminal case" in clause (8) of section 526 need not necessarily be taken to have been used in the narrow sense of a criminal case arising out of an offence already committed.

The High Court is the highest tribunal in these Provinces, and one of its important functions is to supervise the work of all the Criminal Courts subordinate to it, and there is no reason why the legislature should deem it fit to limit the power of the High Court to transfer only such "criminal cases" as arise out of the offences already committed, and for that purpose should use a phrase of a more general import. Besides such a limitation can serve no useful purpose. The contention of the learned counsel for the opposite party that the expression "an accused person" which occurs in section 526 of the Code, indicates that the phrase "criminal case" refers only to such cases as arise out of the offences which have already been committed is without force. That expression has been used in a larger sense, *i. e.*, the person over whom a Criminal Court exercises jurisdiction. BANERJI, J., in

(1) [1905] 2 C. L. J., 614. (2) [1900] I. L. R., 25 Bom., 179.

Queen-Empress v. Mutasaddi Lal ⁽¹⁾ said :—"The Code of Criminal Procedure contains no definition of an 'accused person,' but it was held by the Bombay High Court in *Queen-Empress v. Mona Puna* ⁽²⁾ that the term 'accused' means a person over whom a Magistrate or other (criminal) court is exercising jurisdiction. The same view was taken by the Calcutta High Court in *Jojha Singh v. Queen-Empress* ⁽³⁾. I see no reason to put a different interpretation on the words 'an accused person' in section 434."

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It was further urged that proceedings under sections 176, 488 and 491 of the Code of Criminal Procedure, can hardly be called a "criminal case" notwithstanding the fact that they are conducted under the Code of Criminal Procedure, and this shows that every proceeding held under the Code is not a "criminal case." In our opinion this contention is without substance. We are inclined to hold that in the absence of anything to the contrary, every case over which a criminal court exercises jurisdiction under the Code is a "criminal case" for the purposes of that Code.

On a careful consideration of the wording of sections 526 of the Code of Criminal Procedure, the policy of the law and the cases to which we have referred in this judgment, we hold that the expression "criminal case" in section 526 includes a proceeding initiated under section 145 of the Code, and that the High Court under section 526 has power to transfer it from one court to another court subject, of course, to all the conditions under which a transfer can be made.

In this view of the case it is unnecessary to consider the effect of section 22 of the Letters Patent upon the power of the High Court to transfer a proceeding under section 145 of the Code of Criminal Procedure.

With the above expression of opinion the case was again put up before PIGGOTT, J., who passed the following order :—

PIGGOTT, J.—The Bench to which the question was referred has held that this Court has jurisdiction to make the order of

(1) [1898] I. L. R., 21 All., 107.

(2) [1892] I. L. R., 18 Bom., 661. (3) [1896] I. L. R., 23 Cal., 493.

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transfer required. I have considered the question on its merits, and what chiefly impresses me is the absence of any answer to para. 10 of the applicant's affidavit in the explanation of the Deputy Magistrate. I think a transfer will be in the interests of justice. I, accordingly, transfer this case from the court of Munshi Nizam-ud-din Ahmad to that of the District Magistrate of Ballia. The latter may either dispose of the case himself, or may exercise his own powers of transfer so as to refer it to the court of any other Magistrate of his district competent to dispose of the same, except Munshi Nizam-ud-din Ahmad himself.

A. C. M.

Record returned.

BENI MADHO SINGH AND ANOTHER

versus

JAGAT SINGH AND OTHERS *

CIVIL.

1912.

February, 22.

RICHARDS, C. J.
BANERJI, J.

Hindu widow—Gift to a remote reversioner—Consent by the immediate reversioner—Gift invalid—Registration Act (III of 1877), section 21—Sale-deed registered—Registration not a nullity by reason of want of clear specification.

Held, that a gift by a Hindu widow holding a life interest to a possible reversioner with the consent of the persons who would have taken the estate if she had died at the time was invalid.

Held, further, that a sale-deed having been registered, the registration could not be a nullity for the reason that there was not a clear specification of the property within the meaning of section 21 of the Registration Act.

FIRST APPEAL from a decree of Pandit Mohan Lal Hukku, Subordinate Judge of Cawnpore.

Sundar Lal and *Gokul Prasad*, for the appellants.

Tej Bahadur Sapru, for the respondents.

The judgment of the Court was delivered by

BANERJI, J.—This is the plaintiff's appeal in the suit out of which first appeal No. 167 of 1910, decided by us yesterday, arose. The court below has dismissed a part of the claim on the ground that Musammat Makhana Kunwar made a gift of the property of which she stood possessed in favour of Baldeo Singh, with the consent of the reversioners who were alive at the time of the gift, and the plaintiffs are not entitled to this property. As regards the property which passed to Chhab Nath Singh and from him to his daughter, Dulari Kunwar, the claim has been dismissed^o on the ground that the relinquishment alleged to have been made by Dulari Kunwar in favour of the plaintiffs and others was invalid, because in the opinion of the learned Subordinate Judge the deed was not properly registered inasmuch as it did not contain a sufficient and specific description of the property to which it related.

Banerji, J.

* F. A. No. 189 of 1910.

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Banerji, J.

This appeal has been preferred by the plaintiffs in regard to the part of the claim which, as stated above, has been dismissed by the court below. In our opinion, the appeal must prevail. No doubt, the transfer to Baldeo Singh by Musammat Makhana Kunwar must be deemed to be a gift. Bhawani Singh was alive at the time when the gift was made. He was the next reversioner to the estate, and having regard to all the circumstances, we must assume that he assented to the gift, and so did Musammat Sukha, the other widow of Ishri Singh. This transfer cannot be deemed to be a relinquishment of the rights of Makhana Kunwar in favour of the next reversioner, so as to hasten the succession of the reversioner, because it is manifest that Baldeo Singh was not the next reversioner at the time of the transfer, the next reversioner being his father, Bhawani Singh. He could only take the property after the death of Bhawani Singh, and then only jointly with his brother, Sheo Dayal. Therefore, the transfer by Musammat Makhana Kunwar can only be deemed to be a gift by her to one possible reversioner with the consent of the persons who would have taken the estate if she had died at the time. The court below in support of its view has relied on the decision of their Lordships of the Privy Council in *Bajrangi Singh v. Manokarnika Bakhsh Singh* ⁽¹⁾. This decision was considered by this Court in two subsequent cases, namely, *Bakhtawar and another v. Bhagwana* and *Badam and others* ⁽²⁾, *Abdulla and others v. Ram Lal and others* ⁽³⁾. The ruling of their Lordships was distinguished, and it was held that it would not apply to the case of a gift by a widow with the consent of the next reversioner. We feel ourselves bound to follow these later rulings, and we must hold that the transfer by Musammat Makhana Kunwar cannot deprive the plaintiffs of their reversionary right to the property which was the subject of the transfer. The court below was, therefore, wrong in dismissing this part of the claim.

As to the decision of the lower court in regard to the transfer made by Dulari Kunwar of her interests in her father's estate, we are also unable to agree with that court.

(1) [1907] I. L. R., 30 All., 1. (2) [1910] I. L. R., 32 All., 176.

(3) [1911] 8 A. L. J. R., 1318.

Dulari Kunwar, in fact, sold her rights to the plaintiffs and others for a consideration. Had the sale deed been refused registration on the ground that there was not a clear specification within the meaning of section 21 of the Registration Act of 1877, it might well be said that the action of the Registrar was correct. But we have the fact that the document has been registered, and we are asked to hold that this registration must be deemed to be a nullity. We cannot accept this contention, the document being registered is admissible in evidence, and there is no difficulty whatever in ascertaining the property it deals with. A document of a similar nature was admitted in evidence in the case of *Ram Sidh Pande v. Balgovind* (1). It is true that in that case other matters were considered by the court, but the sections of the Registration Act were not lost sight of, and the court did not reject the document on the ground that it had not been duly registered.

The result, therefore, is that the court below ought to have decreed the whole of the plaintiff's claim as prayed for in the plaint, and it ought to have directed an enquiry as to mesne profits in regard to the whole of the property claimed. We, accordingly, allow the appeal and vary the decree of the court below to this extent that we also decree that part of the plaintiff's claim which was dismissed by the court below. We direct that the enquiry as to mesne profits ordered by the court below should also extend to the property in regard to which the claim was dismissed by that court but has been decreed by us. The defendant will be liable for mesne profits in respect of that portion of the property only which is in the possession of each of them. The appellants will get their costs in this court and in the court below.

Appeal allowed—Decree varied.

(1) [1887] 7 A. W. N., p. 15.

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1912.

May, 3.

PIGGOTT, J.

GANPAT SINGH

versus

TOHFA.*

Transfer of Property Act (IV of 1882), sections 60, 92, 93—Usufructuary mortgage of occupancy holding—Previous suit for redemption decreed conditionally—Condition not complied with—Subsequent suit for redemption not barred.

Held, that a person who had before the coming into operation of the Agra Tenancy Act made a usufructuary mortgage of an occupancy holding is not debarred from maintaining a second suit for the redemption of it by reason of a previous suit to recover possession of the same holding in which the decree was passed, was not complied with.

Sita Ram v. Madho Lal, 1. L. R., 24 All 44, discussed and explained.

SECOND APPEAL from a decree of A. W. R. Cole, Esq., Additional Judge of Aligarh, reversing a decree of Pandit Suraj Narain Mujju, Munsif of Bulandshahr

Tej Bahadur Sapru, for the appellant.

Gobind Prasad, for the respondent.

The following judgment was delivered by

Piggott, J.

PIGGOTT J.—In this case the plaintiff is the occupancy tenant of a certain holding. By a deed, dated February the 16th, 1899, that is to say, before the Agra Tenancy Act (Act II of 1901) came into force, she mortgaged this holding with possession to the defendant. She now brings this suit for redemption upon tender of Rs. 90, the amount of the mortgage debt. The defence is that the plaintiff is debarred from bringing this suit by reason of the result of a previous suit brought by her in the year 1909. It appears that this former suit was not framed precisely as a suit for redemption, but at any rate it ended in a decree, dated November the 22nd, 1909, the effect of which was that the plaintiff might recover possession of the holding in question, subject to her first paying within thirty days the sum of Rs. 90, found to be due to the defendant. An appeal having been preferred against this decree, the plaintiff was foolish enough to neglect

* S. A. No. 932 of 1911.

the fulfilment of the condition imposed upon her and failed to deposit the sum of Rs. 90, within the prescribed period. The subsequent dismissal of the defendant's appeal on March the 18th, 1910, left her without any decree of which she could claim execution. She now brings this second suit as a suit for redemption based upon a tender of the mortgage money made subsequently to the decree in the former suit. The question is, whether this suit is maintainable. The decision must obviously be governed by the ruling of the Full Bench of this Court in *Sita Ram v. Madho Lal* ⁽¹⁾ and by the principles involved in that ruling. I cannot put the case for the defendant more strongly than this; if the former suit of 1909 had ended in a simple decree for possession in favour of the plaintiff, and the plaintiff had neglected to obtain execution of that decree within limitation, she could never have brought a second suit for recovery of possession, no matter how good her title might be. Now the suit actually ended in a decree for possession subject to a certain condition. Failure to comply with that condition left the plaintiff with no decree that she could execute, and it is argued that there is no more reason for allowing her to bring a fresh suit in the one case than in the other. This argument is not without real force, but it overlooks the fact that the decree in the former suit involved, in a sense, a declaration that the parties occupied towards one another the position of mortgagor and mortgagee. When once this is realised, there seems to me no argument in favour of the defendant in the present suit which is not equally an argument against the correctness of the decision of this Court in *Sita Ram v. Madho Lal*. ⁽¹⁾ I think it may be said that the Honourable Judges of the other High Courts who have refused to accept the view of the law taken by this Court in the decision above referred to, have proceeded in the main upon the lines that a distinction must be drawn between a mortgagor's title as such, and the existence of a legal remedy still available to the mortgagor for the enforcement of the same. In one form or another it seems to me that this argument was considered and rejected by all the Judges who decided the case of *Sita Ram v. Madho Lal*. ⁽¹⁾ The decision of this Court proceeds on the assumption that a mortga-

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(1) [1901] I. L. R., 24 All., 44.

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Ganpat Singh

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Piggott, J.

gor's right to redeem continues until it is expressly taken away by some decree of a competent court, that is to say, by some decree which in express terms has the effect of extinguishing that right. Otherwise the mortgagor, in the view taken by this court, has a fresh cause of action everytime he tenders or deposits in court the amount of the mortgage debt and he could not be debarred from bringing a fresh suit merely by the allegation that it was a suit based upon the cause of action as some former suit brought by him. To put the point in another way, this Court holds that the cause of action in a suit for redemption is the mortgagor's title *plus* a valid tender or deposit of the mortgage-debt. Unless, therefore, there has been a decree which makes it impossible for the mortgagor to make a valid tender or deposit, his right to do so, continues. If we turn to the provisions of section 92 of the Transfer of Property Act, it cannot be denied that they afford considerable support to the position taken up by this court. It is evident that one of the objects of the legislature in enacting this section was to provide against multiplicity of suits for redemption. If the provisions of that section are properly carried out, every suit for redemption must end in a decree which will have the effect of finally extinguishing the right to redeem. Now the very fact that such elaborate provision has been made in this section for the sake of securing the above result suggests that, in the absence of such provision, a fresh suit for redemption upon a new cause of action would lie every time the mortgage-debt was tendered or deposited. The point seems to me clearer still, if we consider the special provisions in the case of usufructuary mortgages. A usufructuary mortgagee, as such, has no right to bring the property to sale. Nevertheless, the legislature has thought fit to direct that, in a suit for redemption where the mortgage is usufructuary, the alternative decree in the event of the plaintiff's failing to make the required payment within the prescribed period shall be one for sale of the mortgaged property. The reason for this obviously is that the legislature did not intend that the holder of a usufructuary mortgage should under any circumstances obtain a decree for foreclosure pure and simple, or a decree which should have the effect of a foreclosure. In order to prevent this, and yet at the same time to protect usufructuary mort-

gagees from the danger of a multiplicity of suits for redemption, the legislature adopted the only possible alternative, by providing that in the event of the plaintiff failing to avail himself of his decree for redemption, the mortgaged property should be put up for sale. By so doing the legislature secured for the benefit of the mortgagor whatever difference there might be between the market value of the mortgaged property and the amount of the mortgage-debt. It was no doubt in order to secure this benefit for the mortgagor that the legislature refused to allow usufructuary mortgagees an alternative decree for foreclosure. It seems to me, therefore, that, but for one peculiar feature to which I am about to refer, the case for the defendant in the present suit is upon any reasonable application of the ruling of this Court in *Sita Ram v. Madho Lal* ⁽¹⁾ scarcely arguable at all. The mortgagee was himself a party to the former suit, if he wanted to protect himself against the possibility of a further suit for redemption, it was his business to see that the alternative decree, which was the decree which he himself might have to execute, was properly passed in accordance with the provisions of section 92 of the Transfer of Property Act. By failing to do this, he would lay himself open to a fresh suit for redemption, because the mere dismissal of a plaintiff's suit for redemption does not in itself bar the bringing of a fresh suit upon a fresh cause of action.

The peculiar feature of this case, of course, is that the mortgaged property was not saleable. It was an occupancy holding, and it could not have been put up for sale either under the provisions of the former N.-W. P. Rent Act (Act XII of 1881) or under those of the present Agra Tenancy Act (Act II of 1901). I can only say that it does not seem to me that this circumstance should be allowed to put the mortgagee in any better position. He accepted a mortgage of a right which he knew not to be permanently transferable. As the law now stands, cases of this sort will not arise again, because it is now settled that occupancy holding may neither be sold nor mortgaged with possession. As the law formerly stood, the possibility of a temporary transfer by way of usufructuary mortgage was

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(1) [1901] I. L. R., 24 All., 44.

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admitted; but there is force in the position taken up by the learned District Judge in his decision in the present case, that to permit such temporary transfer to become permanent, by holding that the dismissal of the former suit has debarred the plaintiff for ever from her right to redeem, would be to defeat the provision of the law against the transferability of such holdings. It does not seem to me an unreasonable position to take up, to say that a defendant who accepted a usufructuary mortgage of an occupancy holding prior to the passing of the Agra Tenancy Act (Act II of 1901) must be held to have done so with a knowledge of any inconvenience to which he might be subjected by reason of the fact that the property taken by him on mortgage was not permanently transferable. One of these inconveniences was that no court could ever give him a decree for sale under section 92 of the Transfer of Property Act. This seems to me no good reason for holding that a decree merely dismissing the plaintiff's suit for redemption must, therefore, be held to operate as a decree for foreclosure in favour of the mortgagee, when it was the clear intention of the legislature that no such decree should ever be passed in the case of a usufructuary mortgage. It seems to me preferable to hold on the contrary that the defendant in this case by accepting a usufructuary mortgage of a holding not legally transferable, has left himself open to a series of suits for redemption; because it was impossible for the court to give him, in any conceivable suit, any form of decree, either for foreclosure or for sale, which could have the legal effect of finally extinguishing the mortgagor's right to redeem. I, accordingly, dismiss this appeal with costs.

Appeal dismissed.

SHEO TAHAL

versus

KASIM.*

CIVIL.

1912.

May, 3.

TUDBALL, J.

Code of Civil Procedure (Act V of 1908), section 115, Order IX, Rule 9, Order XLIII, Rule 1(c)—Suit dismissed for default—Application for restoration—Cessation of jurisdiction by reason of cession of territory—Application returned for presentation to proper court—Whether revision lies against order.

A suit was brought to recover a sum of money in the court of the Munsif of Mirzapur. The suit was dismissed for default. Application was made for restoration. Notice was issued thereupon, and a date was fixed for the hearing of the application. In the meantime, the place where the parties resided was transferred to, and became part and parcel of a native state. The application was returned by the Judge to be presented to the proper court. *Held*, that the order being in effect a refusal of the application for re-hearing it was appealable under Order xliii, Rule 1(c) of the Code of Civil Procedure and consequently no application for revision would lie.

CIVIL REVISION from an order of W. R. G. Moir, Esq., District Judge of Mirzapur.

Suit for the recovery of money. The facts are briefly as follows :—

On the 21st January, 1911, a suit was filed by the applicant to recover a certain sum of money from the defendants alleged to be the price of certain goods sold by them to the defendant. The cause of action arose in pargana Bhadohi then in the Mirzapur district. The parties were also residents of the same place. The suit was originally filed in the court of the Munsif of Mirzapur but was transferred to the file of the District Judge of Mirzapur. On the date fixed for hearing, *vis.*, the 17th March, 1911, the defendant appeared and denied the claim, but the plaintiff did not appear. The case was struck off in default of appearance of the plaintiff.

On the 31st March, 1911, the plaintiff applied to the court of the District Judge of Mirzapur under Order 9, Rule 9 of the Code of Civil Procedure, 1908, for an order to set the dismissal aside. Notice was issued to the opposite party. In the meantime, by an agreement between the Maharajah of Benares and the British Government, pargana Bhadohi,

* Civ. Rev. No. 83 of 1911.

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[in the Mirzapur district, was ceded to the Maharajah of Benares, and with effect from the 1st April, 1911, it formed part of the Benares state. By a notification under sections 13 and 14 of the Bengal, North-Western Provinces and Assam Civil Courts Act, 1887, the local government altered the territorial jurisdiction of the courts of the District Judge of Mirzapur removing, with effect from the 1st April, 1911, pargana Bhadohi from the territorial jurisdiction of that court (see *Government Gazette*, United Provinces of Agra and Oudh, dated the 22nd April, 1911, page 369).

On the 31st of May, 1911, the application of the plaintiff under Order 9, Rule 9, came on for hearing before the District Judge, Mirzapur. The defendant objected to the hearing of the application on the ground of want of jurisdiction. The District Judge held that it had no jurisdiction to deal with the application as soon as pargana Bhadohi ceased to form part of British India and directed the application to set the dismissal aside to be returned to the applicant to be filed in the proper court in the Benares state.

The plaintiff applied to the High Court for revision of the order of the District Judge.

Baldev Ram Dave, for the respondent, took a preliminary objection to the hearing of the application upon the ground that the High Court had no power to call for the record of a case in which an appeal lay to it. The order in question was in effect an order rejecting an application under Rule 9, Order 9, and an appeal lay under Order 43, Rule 1 (c).

Damodar Das, for the applicant, contended that the order in question was one returning the application for presentation to the proper court. The court below declined to exercise the jurisdiction vested in it by law. The suit was dismissed in default by the District Judge of Mirzapur. The application for rehearing could be presented only to the court which dismissed the suit in default. No application could be made to a court which never dealt with the case at all. Order 9, Rule 9, contemplates "an order setting aside the dismissal." An order returning such an application for presentation to the proper court is not contemplated by any provision in the Code. An application for revision therefore lay.

Baldev Ram Dave, for the respondent, in reply, submitted that as the court declined to make an order setting aside the dismissal, the application for order under Order 9, Rule 9, must be deemed to have been rejected, and an appeal lay. He contended further that the foundation of the jurisdiction of the District Judge was territorial, and that jurisdiction could no longer be exercised—whatever might be the stage or condition of the litigation at the time—after that territory ceased to be within the jurisdiction of that court. He referred to

Damodhar Gordhan v. Deorani Kanji, [1875] L. R., 3 I. A., 102, at page. 153; S. C. [1876] I. L. R., 1 Bom., 367.

The following judgment was delivered by

TUDBALL, J.—The circumstances out of which this application has arisen are briefly as follows :—A suit was instituted within the British territory and the jurisdiction of the British courts over the subject-matter of the suit and the parties thereto was territorial. It was originally in the court of the Munsif, but was transferred by the District Judge to his court. He dismissed the suit, as the plaintiff failed to appear on the date fixed for hearing. On the 31st of March, 1911, the plaintiff applied under Order 9, Rule 9, for restoration of the suit and a re-hearing. Notice was issued and a date fixed. In the meantime, on the 1st of April, 1911, the territory within which the parties resided and the cause of action arose, was transferred from the British territory and became part and parcel of a native state and, therefore, was outside the jurisdiction of the British court in Mirzapur. When the application came on for hearing, an objection was taken that the British court had no jurisdiction over the subject-matter of the suit and the parties thereto, and therefore the application should be dismissed. The District Judge agreed with this contention and held that he had no longer any jurisdiction in the matter and finally ordered the application for restoration to be returned to the applicant for presentation to the proper court.

The plaintiffs came here in revision, pleading that the court below had jurisdiction to entertain the application and has, therefore, failed to exercise a jurisdiction which vested in it.

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A preliminary objection is taken that the order passed by the lower court is in substance and effect an order rejecting an application under Order 9, Rule 9, and is, therefore, appealable. *Vide* Order 43, Rule 1, clause (c), and therefore this application for revision should be rejected.

For the other side, it is argued, that this is not an order rejecting an application for re-hearing, but it is a refusal by the court to hear that application. To my mind, this hardly seems to be correct. The application was filed when the court had jurisdiction. It was entertained and a date was fixed, and whatever may be the language in which the court passed its order, that order in substance and in effect is an order refusing to grant an application under Order 9, Rule 9, on the ground that the court had no jurisdiction over the subject-matter of the suit or the parties thereto. The order may be a bad one, but it is in substance an order under Order 9, Rule 9, and the plaintiff could have appealed. Therefore, in my opinion, this application for revision must be rejected. It is also very doubtful, indeed, whether the applicant has any really good ground to grumble at the order of the court below. Even on the merits he does not seem to have a good case. The application is rejected with costs.

B. R. D.

Application dismissed.

GANESHI LAL

versus

NAND KISHORE.*

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May, 6.

KARAMAT
HUSAIN, J.

Criminal Procedure Code (Act V of 1898), section 179—Criminal misappropriation—Principal firm at Cawnpore—Branch firm at Gauriganj—Offence committed at Gauriganj—Jurisdiction.

The word 'consequence' in section 179 of the Criminal Procedure Code means a consequence which forms a part and parcel of the offence. It does not mean a consequence which is not such a direct result of the act of the offender as to form no part of that offence.

Hence where an accused misappropriated money belonging to the complainant's branch shop at Gauriganj which money was to be sent to the principal shop at Cawnpore owned by the complainant, *held* that the courts at Cawnpore had no jurisdiction to proceed with the case.

CRIMINAL REVISION from an order of Austin Kendell, Esq., Sessions Judge of Cawnpore.

Satya Chandra Mukerji, for the applicant.

C. Ross Alston, for the opposite party.

The following judgment was delivered by

KARAMAT HUSAIN, J.—In this case Nand Kishore lodged a complaint against Ganeshi Lal. The substance of the complaint is as follows :— The head office of the complainant is at Cawnpore. A branch of the firm was opened at Gauriganj, district Sultanpur, in Sambat 1964. The accused was appointed a *gumashtha* and his share was fixed at four annas in the rupee. He worked till Sambat 1966 and was asked to come to Cawnpore. The accused seemed to have been guilty of criminal breach of trust. The complainant directed him to close the shop at Gauriganj and not to redpen it until the complainant had gone there and had checked the account. The complainant went to his home at Bhiwani in the Hissar district. When he returned in 1907, it came to his knowledge that the accused had opened the shop and misappropriated the money realized by him which he had to send to Cawnpore. A sum of about Rs. 1,583-14-6

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has been misappropriated by him. When the complainant was examined, he distinctly stated that the accused misappropriated the money belonging to the branch of the firm at Gauriganj. The Magistrate to whom the complaint was made, came to the conclusion that he had no jurisdiction inasmuch as the offence appeared to have been committed in Gauriganj. In revision, the learned Judge was of opinion that the court at Cawnpore had jurisdiction. In his order he says "The facts alleged constitute an even stronger case for jurisdiction in the Cawnpore courts than did the facts in a previous case, J. L. R., 19 All., 111 or I. L. R., 26 Cal., 746. Having regard to section 179 and to the above rulings in explanation thereof, I find that the Magistrate had jurisdiction to proceed with the case." An application in revision is made to this court, and it is urged on behalf of the applicant that the order of the Joint Magistrate is right. Section 179 of the Code of Criminal Procedure runs as follows :—"When a person is accused of the commission of any offence by reason of anything which has been done and of any consequence which has ensued, such offence may be enquired into or tried by a court within the local limits of whose jurisdiction any such thing has been done or any such consequence has ensued." The word 'consequence' in this section, in my opinion, means a consequence which forms a part and parcel of the offence. It does not mean a consequence which is not such a direct result of the act of the offender as to form no part of that offence. In *Babu Lal v. Ghansham Das*⁽¹⁾, it is remarked "it is contended that section 179 by reason of the words 'contained in it and 'of any consequence which has ensued' gives the Magistrate at Aligarh in this case jurisdiction. But the only reasonable interpretation which can be put upon these words is that they are intended to embrace only such consequences as modify or complete the acts alleged to be an offence." The above remarks support the view I take. The loss to the principal firm at Cawnpore is, therefore, not a consequence of the act of the accused committed at the branch of the firm within the meaning of section 179, Criminal Procedure Code. In the case of *Colville v. Kristo Kishore Bose*⁽²⁾,

(1) [1908] 5 A. L. J. R., 333- (2) [1899] I. L. R., 26 Cal, 746.

I find the following passage: "He seems to have thrown out in the course of his judgment that he has no jurisdiction to take cognizance of the complaint because the offence, if any, was committed at Shalunar within the jurisdiction of the District Magistrate of Howrah. But it appears to us that the monies having been received from the complainant's firm at Calcutta, and the balance of accounts as stated by the complainant having been rendered in Calcutta, the Presidency Magistrate had jurisdiction to take cognizance of the complaint in question." The above facts are very different from the facts of the case before me, and the case is no authority for the proposition that if an offence under section 408 is committed in a branch of a firm the courts at the head office of the firm will have jurisdiction. In the case of *Q. E. v. O'Brien*(¹), the facts were also different, and the loss to a branch of the firm was not held to be a loss to the principal firm at another place. For the above reasons, I hold, that the courts at Cawnpore have no jurisdiction to proceed with the case, and set aside the order of the learned Sessions Judge. Let the record be returned.

Application allowed.

(1) [1896] I. L. R., 19 All, 111.

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TUDBALL, J.

AZIZ BAKHSH

versus

KANIZ FATIMA BIBI AND ANOTHER.*

Code of Civil Procedure (Act V of 1908), Order XXI, Rule 57—Attachment—Revival of, upon dismissal of decree-holder's application being set aside on review.

The assignee of a simple money decree applied for attachment of two classes of property, (1) property burdened with a mortgage in favour of the assignor, and (2) property not so mortgaged. The first court disallowed the judgment-debtor's objection, but upon appeal it was allowed by the High Court and the application was dismissed *in toto*. The decree-holder, however, made an application for review, and a modified decree was passed dismissing the application for execution in respect of the mortgaged property alone. During the pendency of the application for review, the judgment-debtor had transferred the property to a third person. The lower court after receipt of the first order had sent the record to the record room :

Held that Order XXI, Rule 57 of the Code of Civil Procedure, did not apply as there was no default on the part of the decree-holder, and the decree-holder's application having been dismissed on review in respect of the mortgaged property alone, the application in regard to the non-mortgaged property was not touched, and the attachment on such property subsisted.

EXECUTION FIRST APPEAL from a decree of Pandit Soti Raghubans Lal, Subordinate Judge of Meerut.

Nehal Chand, for the appellant.

B. E. O'Connor and *Ghulam Mujtaba*, for the respondents.

The judgment of the Court was delivered by

TUDBALL, J.—This is an appeal by a judgment-debtor from an order passed in execution proceedings.

The person seeking to execute the decree is the assignee of a simple money decree which was transferred to the court of the Subordinate Judge of Meerut.

The assignee of the decree attached two lots of property, (1) property which was burdened with a mortgage in favour of her assignor; (2) property which was not so mortgaged.

* E. F. A. No. 34 of 1912.

Both sets of property were attached. The judgment-debtor objected that the mortgaged property could not be sold in execution without a suit being brought on the mortgage.

The first court disallowed the objection. An appeal was preferred by the judgment-debtor to this Court, a Bench of which, on 2nd June, 1909, upheld the objection and passed a decree dismissing the application for execution *in toto*. In this order, there was clearly an error, as some of the property attached was not mortgaged property.

Accordingly, on 10th August, 1909, the decree-holder applied for review of the judgment of 2nd June, 1909. The application was granted, and this Court, on 13th June, 1910, passed a modified order dismissing the application for execution only in respect to the mortgaged property and remitting the record to the lower court with orders to continue with the execution of the decree according to law in regard to the rest of the property. In the meantime, the lower court on receipt of the decree of 2nd June, 1909, had, on 18th August, 1909, sent the record into the record-room.

While the application for review was pending *i. e.*, between August 10th, 1909, and June 13th, 1910, the judgment-debtor sold the non-mortgaged property to a third party.

After the decision of 13th June, 1910, the decree-holder applied to the lower court on the basis of this Court's order of that date to go on with the execution proceedings and to sell the attached (non-mortgaged) property. The judgment-debtor (not his transferee) objected, pleading that under Order 21, Rule 57, the previous attachment had ceased to exist, and that a fresh attachment was necessary and the property could not be sold as he had already sold it to another person.

The lower court rejected the objection, and hence this appeal by the judgment-debtor.

Stress is laid on Order 21, Rule 57. The rule clearly does not apply. It relates to the case of a default, by the decree-holder which prevents the court from continuing the execution proceedings and results in a dismissal of the application for execution by reason of that default. In such a case the rule lays down that the attachment ceases to exist directly the order of dismissal is passed. The rule allows the court on

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the occurrence of such default to either dismiss the application or adjourn the proceedings, and adds that if the application be dismissed the attachment ceases at once.

In the present case, there was no default, nor after such a dismissal would the revival of the execution proceedings cause a revival of the attachment, at least so as to prejudice the rights of strangers who have in the meantime acquired a title to the property (*vide* XIV., Cal. L., J., 476). This latter case does not help the appellant who is himself the judgment-debtor; nor is the case reported in XIII, Cal. L. J., 243, of any assistance, for in that case there was a clear specific order releasing the property from attachment. Prior to the Code of Civil Procedure now in force there was often considerable doubt whether an attachment came to an end on the passing of an order dismissing an application for execution by reason of the decree-holder's default (*vide* I. L. R., 33 Cal., 666). This has now been set at rest by Order 21, Rule 57. But in the present case there was no such order of dismissal for default. The first order of dismissal passed by this Court on appeal on 2nd June, 1909, was set aside on review, and the order finally passed on the appeal only disallowed the application for execution in so far as it related to the mortgaged property, and upholding the application in regard to the property now in question and ordering the lower court to go on with the execution of the decree in respect thereto.

In regard to this property there has, therefore, been no dismissal of the application for execution. The lower court's order of 18th August, 1909, consigning the record to the record-room does not and cannot help the appellant. He made the transfer while the application for review was pending. We would point out that his transferee has not come into court.

We hold that in the circumstances of this case the attachment of the property in question at no time came to an end, and we, therefore, dismiss the appeal with costs.

Appeal dismissed.

SALIG RAM

versus

RAM KISHAN DAS.*

Res judicata—Previous application to be declared insolvent dismissed for non-production of evidence—Second application not barred.

Held, that where a previous application to be declared insolvent was dismissed for non-production of evidence, a second application was not barred by the principle of *res judicata*.

FIRST APPEAL from an order of H. Dupernex, Esq., District Judge of Farrukhabad

Gulzari Lal, for the applicant.

Satya Chandra Mukerji (for whom *Peare Lal Banerji*), for the opposite party.

The judgment of the Court was delivered by

KARAMAT HUSAIN, J.—In this case Salig Ram applied to be declared an insolvent. His application was dismissed because he failed to produce evidence. He applied again and that application was dismissed, the court holding that the principle of *res judicata* barred the application. We find ourselves unable to agree with the court below that the principle of *res judicata* applies to this case. The question whether the applicant was or was not insolvent was never tried, and the mere fact that in consequence of his failure to adduce evidence, his former application was dismissed is no ground for holding that the present application is barred by the principle of *res judicata*. We, therefore, set aside the order of the court below and send the case back to it for trial on the merits. Costs will abide the result.

Appeal allowed.

* F. A. F. O. No. 15 of 1912.

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PIGGOTT, J.

SANWAL KUNWAR

versus.

MURLI*.

Agra Tenancy Act (II of 1901), sections 67, 197—Landlord and tenant—Whether suit of one nature may be converted into one of a different nature—Agreement by tenant to pay higher rent if he failed to quit after the stipulated period of lease—Agreement unlawful.

There is nothing in section 197 of the Agra Tenancy Act which justifies a court in turning a suit of one description into a suit of a totally different description. What a District Judge is bound to do under that section is to dispose of the appeal before him, as if the suit had been instituted in what would, in his opinion, have been the right court to try the same.

The lease granted by a landlord to his tenant contained a clause to the effect: "That at the end of 1314 Fasli the defendant would peacefully vacate the land without raising any objection, and that in the event of his failing to do so, he should be liable to pay rent thereafter at the rate of Rs. 400 per annum."

Semble, a contract in the particular form taken by the lease is open to the objection under the provisions of section 23 of the Indian Contract Act; and that the particular stipulation by which the defendant purported to bind himself to pay rent for the land in suit at the rate of Rs. 400 per annum for an unspecified future period, and avowedly as a penalty in the event of his failing to give up possession voluntarily is "unlawful" within the meaning of that section, as being of such a nature that, if permitted, it would defeat the provisions of section 67 of the Tenancy Act.

SECOND APPEAL from a decree of D. R. Lyle, Esq., District Judge of Aligarh, reversing a decree of Babu Radha Krishna, Munsif of Jalesar.

Girdhari Lal Agarwala, for the appellant.

Benoy Kumar Mukerji, for the respondent.

The following judgment was delivered by

Piggott, J.

PIGGOTT, J.—This is a curious case and has had a curious history. The plaintiff is the proprietor of certain land which was leased to the defendant, as an agricultural tenant, for a period of seven years, from 1308 to 1314 Fasli, inclusive. There was a clause in the contract of lease to the following

effect :—That at the end of 1314 Fasli the defendant would peacefully vacate the land in suit without raising any objection ; and that in the event of his failing to do so, he should be liable to pay rent thereafter at the rate of Rs. 400 per annum. On the expiration of the prescribed period the defendant did not vacate the land, and the plaintiff thereupon took proceedings against him for ejectment under the provisions of the Agra Tenancy Act (Local Act No. II of 1901). The defendant claimed the benefit of the provisions of section 67 of that Act, and the court concerned found in his favour on this point. It proceeded to determine further that the enhancement of rent which could fairly and equitably be claimed under the provisions of that section was one of Rs. 5 only, *i. e.*, from Rs. 200 to Rs. 205. Thereafter the plaintiff brought this present suit, in the court of an Assistant Collector, claiming Rs. 200 as rent due to him for the first half of the year 1315 Fasli. The Assistant Collector apparently felt some difficulty about dealing with the suit, and the order actually passed by him was one returning the plaint for presentation before a court of competent jurisdiction, namely, a Civil Court. It is a little difficult to understand how the Assistant Collector arrived at this conclusion, for the suit as brought was nothing more or less than a claim for arrears of rent alleged to be due in accordance with the terms of a certain contract of lease. However this may be, the plaintiff eventually presented the same plaint unaltered before the court of the Munsif of Jalesar in the Aligarh district. That court having in turn held it had no jurisdiction to entertain the suit, the matter finally came before this Court in second appeal. By this Court's order of May 19, 1911, the suit was remanded to the court of the District Judge of Aligarh, with orders to dispose of the same under the provisions of section 197 of the Agra Tenancy Act. The District Judge took up the case accordingly and has disposed of it by a careful and well considered judgment. He was evidently of opinion that the suit as brought was one for arrears of rent, and had been rightly instituted as such in the first instance in the court of the Assistant Collector. Looking, however, at the suit from this point of view, the learned District Judge was of opinion that the Assistant Collector would have had no juris-

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diction to go behind the previous order of a competent Revenue Court by which the rent of the land in suit had been fixed at Rs. 205 per annum. The District Judge actually disposed of the appeal before him entirely in accordance with the view of the case. He held it to be a matter which was *res judicata* between the parties; that the annual rent payable was Rs. 205 and the rent due for the period in suit was half of this namely, Rs. 102-8-0. He found it not to be proved that the defendant had paid any portion of this rent, and he accordingly decreed the plaintiffs claim for Rs. 102-8-0 only, with appropriate orders as to costs and interest. In the body of his judgment the learned District Judge went somewhat further than this and also discussed the question whether the plaintiff would have been entitled to recover anything more than the sum of Rs. 102-8-0, upon a properly framed plaint, in which damages were claimed on account of breach of contract, the contract being, of course, the covenant already referred to in the original lease by which the defendant bound himself under penalty to give up possession of the land in question after the close of the year 1314 Fasli. On this point the learned District Judge found that there was no evidence on the record which would justify him in awarding by way of damages anything more than the sum of Rs. 102-8-0, which he was prepared to decree as arrears of rent. The matter has now once more been brought before this Court in second appeal. Except in so far as the memorandum of appeal raises objections to particular expressions made use of in the judgment of the lower appellate court, which are in no way essential to the decision arrived at, it may be said to raise only two points :—

First, that the plaintiff was entitled under the terms of the contract of lease to recover rent at the rate claimed.

Secondly, that in any event the plaintiff should have been awarded reasonable damages for breach of a particular stipulation embodied in that contract, and in this connection reference is made to the provisions of section 74 of the Indian Contract Act.

This latter point may, I think, be briefly disposed of. There is nothing in section 197 of the Agra Tenancy Act

which justifies a court in turning a suit of one description into a suit of a totally different description. What a District Judge is bound to do under that section is to dispose of the appeal before him, as if the suit had been instituted in what would, in his opinion, have been the right court to try the same. This is precisely what the District Judge has done in the present case. He has held that the suit is essentially one for arrears of rent and he has disposed of the appeal as if the suit then before him, had been instituted in the right court, namely, the court of an Assistant Collector. Apart from this, if I were of opinion that any question of a decree for damages on account of breach of contract could be raised upon the present suit as framed, I should be bound as a Court of second appeal by the finding of the learned District Judge that no damages were proved.

Now I take up the main question in the appeal, namely, whether the plaintiff ought in fact to be permitted to enforce the covenant according to its terms and to claim rent for the year 1315 Fasli at the stipulated rate of Rs. 400. We here touch the fringe of a very large question, namely, how far, and in what manner, is it permissible for a landlord and tenant, when entering into a contract of lease under which the tenant is to hold possession for a term of not less than seven years, to contract themselves out of the special provisions of section 67 and other connected sections of the Agra Tenancy Act. I have come to the conclusion that it is unnecessary for the determination of this appeal to enter into a general discussion of this question, and that it would not therefore be expedient for me to do so. I incline, however, to the opinion that a contract in the particular form taken by the lease now before me is open to objection, under the provisions of section 23 of the Indian Contract Act (Act IX of 1872); and that the particular stipulation, by which the defendant purported to bind himself to pay rent for the land in suit at the rate of Rs. 400 per annum for an unspecified future period, and avowedly as a penalty, in the event of his failing to give up possession voluntarily, is "unlawful" within the meaning of that section, as being of such a nature, that, if permitted, it would defeat the provisions of section 67 of the Agra Tenancy Act. I do not, however, leave my decision entirely

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upon this finding. The question whether the contract to pay rent at this enhanced rate was or was not enforceable, was a question which necessarily had to be brought to trial in the first instance before the Revenue Court which had jurisdiction to determine the same. It was so brought to trial in the course of the ejectment proceedings, and the decision went against the plaintiff. I agree with the learned District Judge in holding that the decision of the Revenue Court in the course of those proceedings, whereby the rent of the land in suit was fixed at Rs. 205 per annum, operates as *res judicata* between the parties, and bars the plaintiff from claiming rent at any higher rate. This appeal, therefore fails, and I accordingly dismiss it with costs.

Appeal dismissed.

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HUSAIN, J.
TUDBALL, J.

SAIYED MUKHTAR AHMAD

versus

MUQURRAB HUSAIN.*

Code of Civil Procedure (Act V of 1908), section 47—Decree—Execution of decree—Interlocutory order—Appeal.

The words of section 47 of the Code of Civil Procedure are no doubt very wide, and if taken in their literal sense will cover every order of an interlocutory nature that may be passed in execution proceedings. But that does not seem to have been the intention of the legislature.

Held, therefore, that an order which determines merely an incidental question as to whether the proceedings are to be conducted in a certain way does not come within the purview of section 47.

Observations of BANERJI, J. in *Jogodishury Debea v. Kailash Chandra Lahiry*, [1897] I. L. R., 24 Cal., 725, followed.

EXECUTION FIRST APPEAL from a decree of Babu Keshab Deb, Subordinate Judge of Moradabad.

The facts appear from the judgment.

Mohammad Ishaq, for the appellant.

B. E. O'Conor and *Abdul Raof*, for the respondent.

* E. F. A. No. 61 of 1912.

The judgment of the Court was delivered by .

TUDBALL, J.—In this case property was attached on the 17th of July, 26th of July, 27th of July, 28th of July, and 12th of August, 1909. The decree-holder along with his application filed an affidavit, dated the 15th of May, 1909, giving full particulars as required by Order 21, Rule 66. After all these proceedings the judgment-debtor objected to the execution of the decree. His objection was disallowed and his appeal to the High Court was also dismissed. When the record went back to the court below in September, 1910, notice was issued to the judgment-debtor under Order 21, Rule 66, and the decree-holder was directed to file an affidavit under the same rule. But as no affidavit was filed by him, the court, on the 11th of November, 1910, struck off the case for default. The order runs as follows :—"The decree-holder notwithstanding two adjournments has failed to prosecute the proceedings. The case, therefore, cannot be adjourned any more. The proceedings are struck off." The court, however, subsequently discovered that that order was a wrong order, and that in fact there was no default of prosecution on the part of the decree-holder. It, therefore, held that the former attachment subsisted and that no fresh attachment was necessary, and it decided to go on with the execution proceedings. The judgment-debtor objected that a fresh attachment was necessary, but his objection was disallowed. From that order disallowing the objection this appeal is preferred. A preliminary objection to the hearing of the appeal is taken by the learned counsel for the other side. The substance of his contention is that this order is a mere interlocutory order and does not come within the purview of section 47 of the Code of Civil Procedure. The words of section 47 are, no doubt, very wide, and if taken in their literal sense will cover every order of an interlocutory nature that may be passed in execution proceedings. But that does not seem to have been the intention of the legislature. In our opinion the view taken by BANERJI J., in *Jogodishury Debea v. Kailash Chandra Lakiry* ⁽¹⁾, is a sound one. On page 739 he remarked as follows : "It is not every order made in execution of a decree that comes under section 244. If that were so, every interlocutory order in an execu-

(1) [1897] I. L. R., 24 Cal. 725.

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tion proceeding, such as an order granting or refusing process for the examination of witnesses would be appealable; and far greater latitude would be given of appealing against orders in such proceedings than is allowed as against orders made in suits before decree—a thing which could hardly have been intended. See *Sri Nath Roy v. Radha Nath Mookerjee* ⁽¹⁾ and *Behari Lal Pandit v. Kedar Nath Mullick* ⁽²⁾. An order in execution proceedings can come under section 244 only when it determines some question relating to the rights and liabilities of parties with reference to the relief granted by the decree; *not when, as in this case, it determines merely an incidental question as to whether the proceedings are to be conducted in a certain way.* I may add that the language of section 244, which enacts that certain questions shall be determined by an order of the court executing the decree, and not by separate suit, clearly indicates that the questions contemplated by the section must be of a nature such that it is possible to suppose that but for the section they could have formed the subject of determination by a separate suit. But a question of an incidental character can never come under that description, and an order determining such a question cannot, therefore, be a decree as defined in section 2." We agree with this view which applies very aptly to the circumstances of this case now before us. The result is that we hold that no appeal lies from the order of the court below, and we dismiss the appeal with costs.

Appeal dismissed.

(1) [1883] I. L. R., 9 Cal., 773.

(2) [1891] I. L. R., 18 Cal., 469.

MUHAMMAD ISHAQ

versus

NATHU.*

CIVIL

1912.

May, 15.

CHAMIER, J.

Tenants-in-common—Adverse possession—Ouster, how presumed.

To constitute adverse possession as between tenants-in-common there must be an exclusion or ouster. Ordinarily sole possession by one tenant-in-common maintained continuously for a long period without any claim or demand by any person claiming under the other tenant-in-common is evidence from which an actual ouster of the other tenant-in-common may be presumed.

SECOND APPEAL from a decree of C. E. Guiterman, Esq., Additional Judge of Meerut, confirming a decree of Babu Ram Ugrah Lal Srivastava, Munsif of Muzaffarnagar.

M. L. Agarwala, for the appellant.

Jogindro Nath Mukerji, for the respondent.

The following judgment was delivered by

CHAMIER, J.—Baksha and the defendant, Nathu, were tenants of an occupancy holding. On Baksha's death, which occurred some eighteen years ago, the defendant retained possession of the entire holding, although Baksha had left a daughter, Sahiba. The plaintiff in this case is the son of Sahiba. He alleges that Sahiba, during her life-time, received one-half of the profits of the holding, but the court below has found that this is not true. The lower appellate court has dismissed the suit on the ground that the plaintiff's claim is barred by adverse possession on the part of Nathu maintained for over twelve years. It appears that when Baksha died, his daughter's name was entered on the record as his successor. The learned District Judge appears to have held that the plaintiff's claim was barred simply because the defendant was in exclusive possession and enjoyment of the profits of the holding for more than twelve years. From the language which he has used, I cannot help thinking that he was not aware of the decision of this Court in *Parbati v. Ram*

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Prasad (1). In that case it was found that the plaintiff, Parbati, had not been in possession of the defendant's share of the house for more than twelve years. STANLEY, C. J., in the course of his judgment, said :—" It is well-settled law that exclusive possession of a co-owner of property which originally was joint does not *per se* amount to adverse possession as against his co-sharer. This certainly is the case where co-sharers are intimately related, as the parties are here." That case was sent back to the lower appellate court for a fresh finding on the question of adverse possession. In *Ganga Dhar v. Paras Ram* (2) it was held that to constitute adverse possession as between tenants-in-common, there must be an exclusion or an ouster. Ordinarily, sole possession by one tenant-in-common is not evidence of ouster; but sole possession by one tenant-in-common maintained continuously for a long period without any claim or demand by any person claiming under the other tenants-in-common is evidence from which an actual ouster of the other tenants-in-common may be presumed. To the same effect is the decision of the Bombay High Court in *Banda-charya Swamirayacharya v. Srinivasacharya* (3), where it was pointed out that possession of one tenant-in-common is ordinarily to be regarded as possession of the other; but where the complainant tenant-in-common has been out of possession for a considerable length of time, and other circumstances occur, it may be possible to presume that there has been ouster. Following the decision of this Court quoted above, I remand the following issue to the lower appellate court :—

" Whether the defendant was in sole possession for upwards of twelve years prior to the suit, and whether such sole possession was, either from the nature of the case or from some act of denial of the rights of the plaintiff, adverse to the plaintiff? "

The court will take such relevant evidence as the parties may adduce. On return of the finding ten days will be allowed for objections.

Issue remitted.

(1) [1908] 5 A. L. J. R., 511.

(2) [1907] I. L. R., 29 Bom., 300. (3) [1903] 5 Bom., L. R., 742.

HARDWAR PAL

versus

KING-EMPEROR.*

Penal Code (Act XLV of 1860), sections 182, 211—Whether sanction necessary—Code of Criminal Procedure (Act V of 1898), Section 195 (1).

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May, 11.

KARAMAT
HUSAIN, J.
TUDBALL, J.

H. made a report against several persons including one *S.* at a police station, charging them with rioting and voluntarily causing hurt. The police made enquiry and sent up several persons for trial but not *S.* Some of these were convicted by the Magistrate, but acquitted by the Sessions Judge. Thereupon *S.* made a complaint to the Magistrate, charging *H.* with having made a false report in respect to himself to the police. The Magistrate took cognisance of the complaint.

Held, that the Magistrate had no power to take cognisance of the complaint by reason of the absence of sanction.

CRIMINAL REVISION against the order of Munshi Kampta Prasad, Magistrate, first class, Basti.

The facts are these :—

On March 23, 1911, a report was made to the police by Hardwar Pal to the effect that several persons named therein, including one Sher Bahadur Singh, had committed the offence of rioting. The police instituted a case against some of the persons named, but not against Sher Bahadur. The case was found to be false by the Magistrate, and the accused was discharged. Sher Bahadur then filed a complaint under section 211 of the Indian Penal Code against Hardwar Pal, who objected that the case could not proceed without the sanction of either the police officer or the court. The Magistrate decided that no sanction was necessary and issued summons against the accused. Hardwar Pal applied in revision.

The case came on for hearing before KARAMAT HUSAIN, J., who referred it to a bench of two Judges.

* Cr. Rev. No. 164 of 1912.

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On the case coming up before the Division Bench.

C. Ross Alston, for the applicant.

The Magistrate was wrong in holding that no sanction was necessary. If the offence be considered as one of making a false charge to the police, the offence would fall under section 182 of the Indian Penal Code and sanction of the police officer would be necessary. The mere fact that Sher Bahadur Singh, one of the persons named in the report, was not sent up by the police for trial, would make no difference. It could never have been the intention of the legislature to require sanction for an offence under section 182 of the Indian Penal Code, and yet not require sanction if the person named in the report filed a complaint under section 211.

Pearry Lal Banerji (for *D. C. Banerji*), for the opposite party.

The real question is whether there is in the present case anything in law debarring a Magistrate from taking cognizance of the offence in respect of which the complaint was filed. It is quite clear that if the offence charged falls under any of the clauses of section 195 of Criminal Procedure Code, sanction would be necessary. The complaint did not allege the commission of an offence under section 182, and there was nothing to prevent the Magistrate from taking cognizance of the offence alleged if it did not come within any of the clauses of section 195. If the facts alleged in the complaint constitute no offence other than an offence under section 182 of the Penal Code, then it might have been contended that the mere mention of another section of the Code could not take the case out of the purview of section 195 of the Criminal Procedure Code. But a false report to the police does constitute an offence under section 211 of the Penal Code.

This Court has held that section 211 consists of two parts, the one contemplates a charge made in a court and the other part contemplates a false charge preferred to the police. Therefore, although a false charge preferred to the police constitutes an offence under section 182 of the Penal Code, it nevertheless constitutes an offence under the first part of section 211 of the same Code.

He cited

Empress of India v. Pitam Rai, [1883] I. L. R., 5 All., 215.

Empress v. Parahu, [1883] I. L. R., 5 All., 598

Queen-Empress v. Bisheshwar, [1894] I. L. R., 16 All., 124.

Imperatrix v. Jijibhoy Govind, [1898] I. L. R., 22 Bom., 596.

Queen-Empress v. Karim Bux, [1887] I. L. R., 14 Cal., 633.

Karim Bux v. Queen-Empress, [1890] I. L. R., 17 Cal., 574.

Queen-Empress v. Nanjunda Rao, [1897] I. L. R., 20 Mad., 79.

It is, therefore, quite settled that the offence charged would fall under section 211 as the charge was not made in court, and as Sher Bahadur Singh was never sent up for trial to court, the offence, though falling under section 211, was not one committed in or in relation to any proceeding in any court. Section 195, clause (b) of the Criminal Procedure Code, does not require sanction for all offences under section 211, but only requires sanction where an offence under section 211 is committed in or in relation to any proceeding in any court. It does not require sanction when the offence is committed before the police.

Ashraf Ali v. The Empress, [1880] I. L. R., 5 Cal., 186; [1899] 3 C. W. N.,

Dharmadas Kunwar v. The Emperor, [1908] 12 C. W. N., 575.

[TUDBALL, J.—The case was sent up by the police as regards some of the persons named in the report. Was not therefore the report an offence committed in relation to a proceeding in court?]

Sher Bahadur Singh, the person named in the report, had no connection whatever with any proceeding in any court. The wrong committed against him was the making of a false report to the police, and as far as he was concerned, the false report had nothing to do with the proceedings in court which were directed against other persons. The false report, although it named several persons in that one document, really constituted distinct and several offences against several persons named in the report, and the matter must be looked at, as if there were so many separate reports against each of the several persons named. One particular person had nothing in common with another person, and the making of the report to the police was only an offence in connection with a proceeding in court *qua* the persons that were sent up for trial and not

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against Sher Bahadur Singh, who was not so proceeded against.

C. Ross Alston, heard in reply.

C. A. V.

The judgment of the Court was delivered by

TUDBALL, J.—The facts out of which this application in revision has arisen are as follows :—

The applicant here went to a police station and made a report against several persons, of whom Sher Bahadur Singh was one. He accused them of the offences of rioting and voluntarily causing hurt. The police made inquiry and sent up several persons for trial but not Sher Bahadur Singh.

The Magistrate tried the accused and the trial ended in the conviction of some of them. These latter appealed to the Sessions Judge who acquitted them.

Thereupon, Sher Bahadur Singh made complaint to the Magistrate, stating the above facts against the present applicant, charging the latter with having made a false report in respect to himself to the police, which, he said, constituted an offence under section 211, I. P. C.

Objection was taken that the Magistrate could not take cognizance of the complaint without sanction obtained and the terms of section 195, Criminal Procedure Code, were invoked to support the argument. The Magistrate has held that sanction is not necessary, hence the present application.

The facts stated in the complaint clearly constitute an offence under section 182, I. P. C., *i. e.*, the giving of false information to the police, but it has been held by this High Court that they also constitute an offence under the first half of section 211, I. P. C.

The argument which found favour with the court below is as follows. If the complaint had been made of an offence under section 182, I. P. C., on the facts of the present case, the sanction of the Police officer would have been necessary under section 195 (1) (a), Criminal Procedure Code, but that clause makes no mention of an offence punishable under section 211, I. P. C., therefore, as the complaint is laid under this latter section, no sanction is necessary. Section 195 (1)

(b) relates only to proceedings in Court. This may perhaps be the natural result of the decision that the making of a false report to the police where the case has not come into court constitutes an offence under section 211, I. P. C., as well as one under section 182 I. P. C., but it leads to this absurdity that in the case of the lesser offence under section 182, a sanction is a *sine qua non*, whereas in the case of the more serious offence under section 211 I. P. C., a sanction is not at all necessary. It is unnecessary to set forth the reason why the law lays down the necessity of a sanction in cases of the class mentioned in section 195, Criminal Procedure Code. It is obvious that they operate in the cases of both sections 182 and 211, I. P. C., and it was never intended by the legislature that complaint should be made in the circumstances of the present case without the sanction of the police officer concerned.

The difficulty might be solved by holding that in taking cognizance in the present case of an offence under section 211, I. P. C., the Magistrate is also taking cognizance of an offence under section 182 I. P. C., which he is forbidden to do by the terms of section 195, Criminal Procedure Code, without the sanction of the police officer concerned. He is, therefore, doing what is forbidden by the Code, and his action is illegal and *ultra vires*. The true solution may be, as suggested by Counsel for the applicant, that the legislature never intended section 211, I. P. C., to apply to anything except charges preferred in court to a Magistrate and enacted section 182, I. P. C., to cover such a case as the present. However, there are the rulings of this Court and other High Courts on the subject, and we are able in the circumstances of the present case to do justice without going behind those rulings, and it is, therefore, unnecessary to discuss the point further. In the present case, there were proceedings in court. On the basis of the alleged false report the police made inquiry and sent up some of the accused for trial. Assuming that Hardwar Pal falsely implicated Sher Bahadur Singh in his report, and that the offence he thereby committed was one under the first paragraph of section 211, I. P. C., still, it is quite clear that this offence was one committed in relation to a proceeding in court. It is obvious that there is considerable relation between

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the first report and the proceeding in court, for the latter is the result of the former. The report led to the police inquiry and the latter to the proceeding in court. The offence if it be one under section 211, I. P. C., committed in respect to Sher Bahadur Singh, was committed in relation to the proceeding in court, and at least the sanction of the court would be necessary under section 195 (1) (b). The argument that there was a separate complaint made to the police against each of the persons named in the report is the mere splitting of a hair as well as of a report. There was one report which led to a proceeding in court.

Whichever view we take of the law, it is clear in the circumstances of this case that the Magistrate had no power to take cognizance of the complaint made by reason of the absence of sanction.

We allow the application and quash the proceedings as the Magistrate's action is illegal.

A. C. M.

Application allowed.

ASGHAR HUSAIN.

versus

PAL AHIR AND OTHERS.*

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1912,

May, 17.

TODBALL, J.
CHAMIER, J.

Estoppel—Occupancy holding sold as fixed-rate tenancy—No objection by judgment-debtor in suit or in execution proceedings—Possessory title.

Where an occupancy holding mortgaged as a fixed rate tenure was sold at auction, as such, and the decree-holder having purchased it, remained in possession thereof for eleven years, but was subsequently dispossessed by the judgment-debtor, *held* that the defendant was estopped from setting up the plea that the holding was an occupancy tenure and that the defendant having no title at all, the plaintiff was entitled to regain possession on the strength of his possessory title. Decision of RICHARDS, J., reported in 8 A. L. J. R., 404, reversed.

APPEAL under section 10 of the Letters Patent against the decision of RICHARDS, J.

* L. P. A. No. 39 of 1911.

Action in ejectment. Plaintiff's appeal.

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1912.

The material facts will appear from the judgment of RICHARDS, J., reported in 8 A. L. J. R., 404.

Asghar Husain

v.
Pal Ahir.

S. C. Banerji, for the appellant. The defendants, who are the mortgagors and, as such, were defendants to the suit on the mortgage, and who were judgment-debtors to the decree in execution of which the plaintiff purchased the property in dispute, had full knowledge of all proceedings before and after execution and had full opportunity of raising an objection at several stages of those proceedings that the holding was an occupancy holding, and as such, non-transferable. Having failed to raise such objection at any time prior to the sale, it was not competent for them to resist the purchaser after the confirmation of his sale, when, so far as the parties to the execution case were concerned, the title vested in the purchaser.

Dwarka Nath Pal v. Tarini Shankar Roy, [1907] I. L. R., 34 Cal., 199.

Moreover, the defendants having failed to come within six months of their dispossession, their occupancy right was extinguished, and they had no right left to interfere with the possession of the plaintiff.

Dalip Rai v. Deoki Rai, [1899] I. L. R., 21 All., 204.

Muhammad Ishaq Khan, for the respondents.

The principle of estoppel could not be evoked to defeat the plain provisions of a statute. There was an express provision of law that an occupancy holding could not be sold. The fact that the defendants did not raise the point during the pendency of the suit and the execution proceedings could not operate as an estoppel.

Jagadbandhu Saha v. Radhakrishna Pal, [1909] I. L. R., 36 Cal., 920.

Abdul Aziz v. Kantlu Mallik, [1911] I. L. R., 38 Cal., 512.

The defendants being in actual physical possession of the property, the plaintiffs must establish his title before he could oust them.

[TUDBALL, J.—The plaintiff had possessory title which the defendants had no right to disturb.]

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[CHAMIER, J.—The defendants were occupancy tenants many years ago ; they have now ceased to be so.]

True, they were occupancy tenants and were wrongfully dispossessed. They, however, got back possession before the expiry of 12 years. They could not be ejected. Section 79 of the Agra Tenancy Act applied where the zamindar dispossessed his tenants. It did not apply to the case of a dispossession of a tenant by an outsider.

S. C. Banerji, was not heard in reply.

The judgment of the Court was delivered by

Tudball, J.

TUDBALL, J.—The facts of the case out of which this appeal has arisen are as follows. The predecessors-in-title of the defendants-respondents were occupancy tenants of a certain holding. On the 4th of June, 1885, they mortgaged this holding *describing it as a fixed-rate tenure* in favour of the *samindar of the village*. A suit was brought to enforce the mortgage in December, 1895, and on the 27th of July, 1896, a decree for sale was passed on the 23rd of August, 1897, the property was sold as a *fixed rate tenure* and was purchased by the plaintiff, a stranger to that suit. The judgment-debtors objected to the zamindar being allowed to bid at the sale. On the 2nd of November, 1897, a sale-certificate was granted to the plaintiff. From that date up to the 16th of October, 1908, the plaintiff had been in possession of the holding paying rent to the zamindar. On the latter date, he was dispossessed by the defendants, who asserted that the land was their occupancy tenure. Hence the present suit was brought by the plaintiffs to recover possession. The court of first instance and the lower appellate court decreed the claim. On second appeal to this Court the learned Judge, before whom the case came, dismissed the suit, holding that as a right of occupancy could not be sold in execution of a decree, the plaintiff acquired no title to the holding, and therefore he was not entitled to a decree in a suit for ejectment against the defendants. Two points are pressed before us. The first is that the judgment-debtors are estopped from saying that the tenure was an occupancy tenure and not a *fixed rate tenure* ; and, secondly, even though no title passed to the plaintiff by the auction-sale, still, on the 16th of October, 1908,

the defendants had no title themselves, and therefore the plaintiff is entitled to a decree for possession against them on the strength of his possessory title. We think both these contentions are sound. It is clear that the defendants as well as the zamindar gave out that the tenure was a fixed rate tenure, that is, one transferable in execution of a decree. The judgment-debtors in the mortgage suits raised no objection whatsoever either in the course of the suit or in execution proceedings on the ground that the tenure was not transferable under law. The plaintiff acting on the belief that the tenure was a fixed rate tenure as stated by the parties to the mortgage-deed and the mortgage suit, purchased it. We think that it does not lie in the mouth of the defendants to say now that the tenure was not a fixed-rate tenure. Furthermore, it is quite clear that for about eleven years the defendants had been out of possession. The plaintiff has held possession and has been accepted by the zamindar as a tenant and has paid rent for the holding. Any right which the defendants had as tenants disappeared long ago, and when, on the 16th of October, 1908, they dispossessed the plaintiff, the latter had at least a possessory title, while the defendant had no title whatsoever. On the basis of his possessory title alone, the plaintiff would be entitled to a decree. We allow this appeal, set aside the judgment of the learned Judge of this Court and restore the decree of the lower appellate court. The plaintiff will have his costs throughout.

P. D.

Appeal allowed.

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RICHARDS, C. J.
TUDBALL, J.

GÜPTESHWAR RAM AND OTHERS

versus

RATI KRISHNA RAM AND ANOTHER.*

*Pre-emption—Custom—Wajib-ul-arz—Loss of right—Joining a co-sharer
having an inferior right in the purchase.*

In a suit for pre-emption the vendees who were persons having an equal right of pre-emption with the plaintiffs were *held* to have lost their right as against the plaintiffs by associating with them a co-sharer who possessed an inferior right.

Held also upon a discussion of the evidence and with reference to the terms of the *wajib-ul-arzes* that the custom existed.

SECOND APPEAL from a decree of F. D. Simpson, Esq., District Judge of Gorakhpur, confirming a decree of Babu Kashi Nath, Officiating Munsif of Bansgaon.

Suit for pre-emption. The facts and arguments appear from the judgment.

Parmeshwar Dayal, for the appellants.

Girdhari Lal Agarwala, for the respondents.

The judgment of the Court was delivered by

Richards, C. J.

RICHARDS, C. J.—This appeal arises out of a suit for pre-emption. The plaintiffs alleged that a custom of pre-emption prevailed and that one of the vendees, although he had an equal right with the plaintiffs, had lost his right by joining with him in the sale a person, who though a co-sharer had an inferior right to the plaintiffs. The defendants alleged that there was no custom of pre-emption and that the joining of a person, who was a co-sharer, although his right was inferior, did not entitle the plaintiffs to pre-emption even on the assumption that a custom of pre-emption prevailed in the mahal. Neither side gave oral evidence, but there was adduced in evidence the *wajib-ul-arz* of 1833, the *wajib-ul-arz* of 1860, and certain decrees, in some of which it was held that a custom existed and in others that it did not exist. The learned Munsif considered the evidence carefully and came to the conclusion that the custom existed. He also held that the joining in the purchase of a person who had

* S. A. No. 511 of 1911.

inferior rights to the plaintiffs forfeited the right of the vendee whose right was equal to that of the plaintiffs.

The learned District Judge's judgment is not so satisfactory. He decided the case entirely on the words of the *wajib-ul-ars* of 1860. In this we think he was wrong. He ought to have considered the evidence adduced by both parties and come to a conclusion whether or not the custom existed. As, however, we have all the evidence before us, we think that there is no necessity, specially where no oral evidence was adduced, to put the parties to the unnecessary expense of a further hearing. Mr. Parmeshwar Dayal has called our attention to the history of the village in the *Kaifyat Nisamat*, which he strongly relies upon, as showing that no custom existed. He has also called our attention to the fact that the decree in which the custom was upheld was a compromise-decree. The *wajib-ul-ars* of 1833 states the right of pre-emption in general terms. The *wajib-ul-ars* of 1860 states it with much more particularity. It gives a right first to a near co-sharer, and secondly, to a co-sharer in the *thok*. The defendant No. 1 is a co-sharer in the same *khata* with the plaintiffs. The other vendee is a co-sharer in the same *thok* but in a different *khata*. We think both the courts below were correct in holding that a co-sharer in the same *khata* was a nearer co-sharer than a co-sharer in another *khata* though in the same *thok*. We also think that if we assume the custom of pre-emption to exist, a vendee, although having an equal right with the plaintiff, loses his right when he brings in as a co-vendee a co-sharer having an inferior right. It is urged that the bringing in of a co-sharer, even though his right is inferior, is very different from introducing a stranger. It is admitted that the introduction of a stranger forfeits the right of the co-sharer against whom pre-emption is sought. We, however, can recognise no distinction in principle between the introduction of a stranger and the introduction of a person having an inferior right to the pre-emptor. If it were otherwise pre-emption as between co-sharers could always be defeated if one co-sharer having an equal right could be induced to join in the purchase,

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Ram,

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The question remains whether or not we should hold that the custom of pre-emption has been proved to exist. With regard to the litigation it shows this much that the right of pre-emption has consistently been claimed. Unfortunately it would appear that the question was never tried out in any previous litigation in the way we think it ought to have been tried out, namely, by hearing and considering the evidence adduced by the parties *pro* and *con*. The cases were generally decided solely upon the actual words, appearing in the *wajib-ul-arz*, and as we know it very seldom happens that any two Judges take precisely the same view of the meaning of those words. We, therefore, think that in the circumstances of the present case the reference to the previous litigation shows little more than that the right of pre-emption has been from time to time claimed. In our opinion and on the authority of *Returaji Dubain v. Pahlwan Bhagat* (1), the reference to the right of pre-emption in these two *wajib-ul-arzes* raised a *prima facie* case that a custom of pre-emption prevailed in the village. It is said that the history of the village, as set forth in the *Kaifiyat Nizamat*, shows that no custom of pre-emption could ever have arisen, and this is sufficient to rebut the *prima facie* case established by the plaintiffs. Having carefully considered this document, we do not think, that in the present case it does rebut the plaintiff's case. The history of the village shows that the zamindari is a very old one. So far as the *Kaifiyat Nizamat* goes, it does not show that there was ever a transfer or sale subsequent to the year 1833. There were auction purchases, but in these cases the right of pre-emption would not be set up. It is urged that the property came into the single possession of a Raja in 1220 Fasli. Even this is not very conclusive, because we find the next settlement was not made with the Raja, but apparently with the same family who were the proprietors before the Raja came in. It is, therefore, probable that the Raja's interest was of a temporary character. On the whole we think that the plaintiff established the existence of the custom of pre-emption he set up. This being so, the decree of the court below was correct. We, accordingly, dismiss the appeal with costs.

Appeal dismissed.

(1) [1911] I. L. R., 33 All., 196.

MUHAMMAD YASIN

versus

ILAHİ BAKHSH AND OTHERS.*

CIVIL

1912.

May, 23.

RICHARDS, C. J.
TUDBALL, J.

Landlord and tenant—Grove—Transferability—Wajib-ul-arz—Persons planting with consent of zemindars who are in possession of groves—Maliks.

Where under the terms of a *Wajib-ul-arz* persons, who plant with the consent of the zemindars who are in possession of groves, are to have the rights of a *malik*, they are entitled to sell the groves.

APPEAL under section 10 of the Letters Patent against the decision of BANERJI, J., reversing the decree of Babu Keshab Deo, Subordinate Judge of Jaunpur, who confirmed the decree of Munshi Harbandhan Lal, City Munsif.

Suit for possession.

The facts briefly are as follows :—

The plaintiff, who was a zemindar to the extent of a two anna nine pie share, had purchased a grove from one Jagawal Lal on December 20, 1900. The courts below found that the grove was planted by Jagawal Lal on the waste land, with the permission of the zemindar, and that as no condition was attached to this permission, Jagawal Lal was not a tenant. The defendants, who were zemindars of the remaining thirteen annas three pies, objected that the plaintiff acquired no title by the purchase. Hence this suit for possession. The *wajib-ul-arz* of the village provided with respect to a grove as follows :—“The persons who had planted a grove and who are in possession of a grove have the rights of an owner (*ikhtiar malikana hasil hai*). If any trees fall down, they can plant fresh trees without the permission of the zamindar..... when the land becomes denuded of all trees, the planter of the grove will have the first right to cultivate the land.” The courts below decreed the claim, but on second appeal, BANERJI, J., dismissed it.

* L. P. A. No. 6 of 1912.

CIVIL.

1912.

Muhammad
Yasin
v.
Ilahi Bakhsh.

BANERJI, J.—This was a suit for possession of certain trees existing on plots of land Nos. 568 and 569, which are part of the waste land of the village. The parties to the suit are co-sharers in the zamindari. The plaintiff purchased the trees from one Jagaoli Lal under a sale-deed, dated 20th December, 1900. He alleged that the trees belonged to the predecessors-in-title of his vendor, that he was in possession by virtue of his purchase and that the defendants were wrongfully interfering with him and by virtue of an order of the criminal court had taken possession. The defendants stated that the trees belonged to the zamindars and had been planted by them, that the plaintiff's vendor or his predecessor was never in possession, and even if the trees were planted by Thakur Dayal, the ancestor of the plaintiff, he had left the village, and the trees had lapsed to the zamindars. It has been found by the lower appellate court that the trees in question were planted by Thakur Dayal who was a member of a joint Hindu family, that Jagaoli Lal was the last male member of the joint family, that he was the owner of the trees, that Thakur Dayal or the plaintiff's vendor did not abandon the village, and that after the sale to the plaintiff the latter was in possession. The learned Subordinate Judge has also found that Thakur Dayal was not a tenant by which he apparently means an agricultural tenant. But he holds that as it has not been shown that Thakur Dayal had no right to sell the trees, it must be presumed that he had such right. Accordingly, the lower appellate court affirmed the decree of the court of first instance, decreeing the plaintiff's claim. It seems to me that for a proper determination of this suit it is necessary to ascertain certain facts which have not been found by either of the courts below. It should be found whether Thakur Dayal was in possession adversely to the zamindars. If he was not in adverse possession and planted the trees with the permission of the zamindars, it should be ascertained under what conditions he was allowed to plant the trees. If he planted the trees on the condition that he should have the right to enjoy the produce of the trees and should also be competent to sell them, the plaintiff has acquired a valid title to the trees. If, on the other hand, there was a restriction upon his right to transfer, the sale to the plaintiff can have no effect. There would still

be the question whether by custom or otherwise, a person planting trees with the permission of the zamindar has a right to sell the trees either to some of the zamindars or to strangers. I accordingly refer the following issues to the lower appellate court under Order 41, Rule 25, of the Code of Civil Procedure. (1) By what right did Thakur Dayal plant the trees in question, and what was the nature of his possession of the trees. Was he in adverse possession of them? (2) Did Thakur Dayal plant the trees with the permission of the zamindars? (3) If he did so, what were the conditions, if any, under which he was permitted to plant the trees? (4) If no particular conditions were attached to his right of enjoying and selling them, had he by custom or otherwise a right to sell the trees in question? The court will take such evidence relevant to the above issues as may be adduced by the parties. On return of the findings ten days will be allowed for filing objections.

After receipt of the findings the appeal was allowed.

The plaintiff appealed.

Peary Lal Banerji, for the appellant.

The plaintiff as purchaser of the rights of the grove-holder was entitled to retain possession of the grove as such, as long as the grove retained its character. If the original grove-holder could not be dispossessed, there was no reason to hold that his transferee could be dispossessed. There is nothing in law to show that the right of a grove-holder is a mere personal right. The Tenancy Act which makes the interest of a non-occupancy tenant non-transferable, does not apply to a grove-holder. This was decided in

Ismail Khan v. Mithu Lal, [1912] 9 A. L. J. R., 483.

Moreover, in the present case the *wajib-ul-ars* distinctly recorded the fact, that grove-holders had rights of ownership with respect to their grove. The word *malik* is most general and comprehensive, and as observed by their Lordships of the Privy Council, implies absolute ownership unless there is anything in the surrounding circumstances to qualify such meaning.

Surajmani v. Rabi Nath Ojha, [1908] I. L. R., 30 All., 84.

Muhammad Ishaq Khan, for the respondent.

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It is quite clear that full rights of ownership were not given to a grove-holder. If such rights were given, the *wajib-ul-ars* would not record the fact that a grove-holder was not entitled to replant trees in case the trees fell down. The whole language of the *wajib-ul-ars* clearly controls the opening sentence.

Peary Lal Banerji, not heard in reply.

The judgment of the Court was delivered by

Richards, C. J.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiff claimed to recover possession of a grove. The court of first instance and the lower appellate court decreed the plaintiff's claim. On second appeal to this Court the decrees of the courts below were reversed and the plaintiff's suit dismissed. The facts are very simple and undisputed. The grove was planted by one Thakur Dayal with the consent of the zamindars. The plaintiff, who is also a zamindar, purchased it from Jagaoli Lal, the representative of Thakur Dayal, on the 20th of December, 1900. He has been ousted from possession by the other zamindars, who have been put into possession evidently under section 145 of the Code of Criminal Procedure. The *wajib-ul-ars* deals very fully with the rights of persons to plant groves. It is notorious that in some places it is considered by the zamindars themselves very desirable to encourage the planting of groves. The *wajib-ul-ars* in the present case shows that this was the case in the village in question. It provides that persons who plant with the consent of the zamindars, or are in possession of groves, are to have the rights of a *malik*. They can cut down and sell the trees on terms of paying one-fourth of the value of the timber to the zamindars. They are entitled to retain possession of the grove so long as it continues to have the characteristic of a grove. They are entitled when a tree is cut down, or falls down, to replace it with another without even asking the consent of the zamindar. Even after the trees have been cut down entirely, they are to have the first right to become tenants of the land at a rent payable to the zamindars. From the above recital of the *wajib-ul-ars* it would appear that the zamindars on whose behalf the *wajib-ul-ars* was prepared, made provision not only for the actual planters of the groves but persons who had

become possessed of them. Furthermore, it is quite clear that long possession of the grove by persons other than zamindars was contemplated. Trees do not grow up in a day, and further the owner for the time being of the grove was entitled to renew it from time to time by planting fresh trees. It is, therefore, quite clear that the person who planted a grove with the consent of the zamindars, acquired substantial right of a lasting and valuable nature. It is almost impossible to understand how in many cases the planter of a grove could enjoy to the full the benefits conferred upon him by the zamindars when he agreed to plant a grove unless he had a right to transfer it. The *wajib-ul-arz* contemplates enjoyment beyond an ordinary man's life. It almost seems to follow from the terms of the *wajib-ul-arz* itself that the planter of the grove had a right of transfer. *Prima facie* every man has a right to dispose of any property he possesses, whether it be a grove or anything else. Of course it frequently happens that the legislature for reasons of policy places restrictions on rights of transfer, for example, in the case of certain tenancies, it is expressly provided by act of the legislature that the tenant shall have no power to transfer, and if the grove in question was part of, or an appurtenance to, such a tenancy, it is clear that the tenant could not sell the trees. We know of no law which prohibits a person who has acquired rights similar to those of Jagaoli Lal from transferring such rights. Jagaoli Lal planted this grove and acquired all the rights and privileges mentioned in the *wajib-ul-arz*. There certainly is no legislative enactment prohibiting such a transfer. In the present case it is urged that there was a finding of the court that there was no custom or evidence of a custom entitling a grove-holder to sell. In our opinion, the *wajib-ul-arz* affords the strongest evidence that the grove-holder in the present case had an interest which he was entitled to transfer. Reliance is placed on an unreported case, Letters Patent Appeal No. 23 of 1909. In some respects the facts in that case were not altogether dissimilar to the facts in the present case, but it would appear from the judgment that there was this very important distinction. The *wajib-ul-arz* instead of stating that the planter of a grove was a *malik* of the grove, on the contrary, stated that the

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Richards, C. J.

trees belonged to the zamindars. The only entry in favour of the defendant was a note to the effect that the tenants also claimed the trees. We think that this case is quite distinguishable from the case before us. In our opinion the decree of the lower appellate court on the facts of the present case was correct and ought to be restored. We, accordingly, allow the appeal, set aside the decree of this Court and restore the decree of the lower appellate court with costs of both hearings in this Court.

A. C. M.

Appeal allowed.

PARSOTAM RAO TANTIA AND ANOTHER

versus

RADHA BAI AND OTHERS.*

CIVIL.

1912.

May, 29.

RICHARDS, C. J.
BANERJI, J.

Civil Procedure Code (Act V of 1908), section 2—Determination of an issue—No decree passed—No appeal lies.

A plea of *res judicata* was raised by the defendant which was decided against him by the court. No preliminary decree was passed in the suit. *Held*, no appeal lay inasmuch as the determination of such an issue was not a decree within the definition of the term given in the Code of Civil Procedure.

FIRST APPEAL from a decree of Pandit Mohan Lal Hukku, Subordinate Judge of Cawnpore.

Satish Chandra Banerji and *Surendra Nath Sen*, for the appellants.

Sunder Lal and Motilal Nehru, for the respondents.

The judgment of the Court was delivered by

Banerji, J.

BANERJI, J.—A preliminary objection has been taken to the hearing of this appeal on the ground that no decree has been passed in the suit, and therefore no appeal lies. What happened in the court below was this. A plea of

* F. A. No. 73 of 1911.

res judicata was urged on behalf of the defendants. Arguments were heard in regard to that plea and the court came to the conclusion that the matter was not *res judicata* between the parties. A number of other issues were framed and the court, after determining the preliminary point, referred to above, proceeded to try the other issues. It is from the decision upon the issue as to *res judicata* that this appeal has been preferred. We are of opinion, that the determination of such issue is not a decree within the definition of that term as given in the Code of Civil Procedure. No preliminary decree has been passed in the suit. What the definition means is that a court may pass a preliminary decree in certain circumstances, which is appealable, and a final decree subsequently. It could never mean that the determination of each issue would give rise to an appeal, and that such determination could be deemed to be a decree.

We, accordingly, allow the preliminary objection and dismiss the appeal with costs.

Appeal dismissed.

BAIJ NATH

versus

RAJA RAM.*

Criminal Procedure Code (Act V of 1898), sections 200, 202—Duty of Magistrate—Further enquiry.

The duty of Magistrate receiving a complaint is set out in section 200 of the Code of Criminal Procedure, and consists in finding out whether there is any matter which calls for investigation by a Criminal Court. The investigation which he is to make must be conducted by him personally and cannot be passed on to another, and section 202 is clear on the point.

CRIMINAL REVISION from an order of H. W. Lyle, Esq., Sessions Judge of Agra.

* Cr. Rev. No. 248 of 1912.

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1912.

Parsotam Rao
Tantia

v.

Radha Bai.

Banerji, J.

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1912.

May, 31.

KNOX, J.

CRIMINAL.

1912.

Baij Nath
v.

Raja Ram.

*Knox, J.**C. Ross Alston*, for the applicant.*G. P. Boys and Binode Bihari*, for the opposite party.

The following judgment was delivered by

KNOX, J.—Raja Ram, a young man, who, it is said, has just attained his majority, filed a complaint in the court of a Magistrate of the first class at Agra. The complaint was laid against two persons, one of them being Makhan Lal, who is said to be a *Munim* of the firm of which, the complainant says, he is the proprietor. The complaint is certainly, as it stands, a rambling document with a good deal of irrelevant matter. It is, however, a complaint and the complainant is entitled to have it properly considered by the Magistrate in whose court he made it. The duty of a Magistrate receiving such a complaint is set out in section 200 of the Criminal Procedure Code. It is the Magistrate's duty at once to examine the complainant on oath and to reduce the substance of that examination to writing. In the present instance, there was a most perfunctory carrying out of these important provisions of the Code. I doubt myself whether the Magistrate did examine the complainant. If he did, and if the substance of the examination has been correctly reduced to writing, the Magistrate could have been at no pains to find out what really was the complaint made before him. This was all the more necessary inasmuch as the complainant was a minor, who had just attained majority, and the person against whom he was making the complaint is the *Munim* of the firm, presumably a man well-acquainted with the business procedure of such firms. I do not say that the Magistrate was to go out of his way, and in any way to partizan the complainant. This would be a serious error, but he is there to do justice between the parties, and it was his duty to find out whether there was any matter which called for investigation by a Criminal Court. The Magistrate contented himself with the four or five lines of a very perfunctory examination, and he then directed an investigation by one Seth Suraj Bhan, who is, I believe, an Honourary Magistrate. Now, if the Magistrate had ever studied section 202, he would find that the duty of making such an enquiry as is here contemplated, lies upon him. This was no case for a local investigation,

There was no quarrel about boundaries or any matter of that kind, and it is only a local investigation which the Magistrate after examining the complainant can pass on to some one else. The order of the Magistrate passed under section 202 was an illegal order and everything that followed from it is illegal. The Magistrate, however, seeing in this case through the eyes of the said Honourary Magistrate, Suraj Bhan, came to the conclusion that the matter was one to be dealt with, as he describes it, under the more difficult procedure of the Civil Court. Why the procedure of the Civil Court should thus be characterized, I do not know. Anyhow the matter went up to the learned Sessions Judge who has very properly, in my opinion, ordered a further enquiry in this matter which had been dismissed under section 203. I am asked to revise this order, but the grounds taken are precisely the very grounds which should be urged in favour of a more full and legal enquiry. It is really owing to the Magistrate's having neglected to carry out a proper enquiry in the first instance, that all this trouble is due. I do not know why Baij Nath and Makhan Lal are so keen in opposing this order. No process up to the present movement has been issued against them, there has not been any injury to them and they are in the position of persons running out to meet a danger which has not yet come to their door. It may well be that when a proper enquiry has been held under sections 200 and 202, that the Magistrate may still find that there is no sufficient ground for proceeding or it may be, that he will find that there is good ground for proceeding. Upon that matter, I make no pronouncement. The order of the Sessions Court is upheld. The case will go back for a further enquiry according to law.

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Baij Nath
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Knox, J.

Application dismissed.

CRIMINAL

1912.

June, 7.

CHAMIER, J.

MADAN GOPAL,

versus

KING-EMPEROR.*

Penal Code (Act XIV of 1860), section 498—Enticing away a married woman—Whether a valid marriage may be contracted between a Banya and a woman born of connexion between a Brahman male and a Banya woman.

Held, that a marriage between a Banya and a woman born of a Brahman father and Banya mother which is recognised by the caste to which her husband belongs is valid, and a person who entices away such a woman is guilty of an offence under section 498 of the Penal Code.

Padam Kumar v. Suraj Kumari, I. L. R., 28 All., 458, and *In the matter of Ram Kumari*, I. L. R., 16 Cal., 264, referred to.

CRIMINAL REVISION from an order of C. A. C. Streatfeild, Esq., District Magistrate of Benares.

R. K. Sorabji, for the applicant.

R. Malcomson (Assistant Government Advocate), for the Crown.

The following judgment was delivered by

Chamier, J.

CHAMIER, J.—The applicant was convicted by a Magistrate of the second class in the Benares district under section 498, Indian Penal Code, of having enticed away Musammat Kharag Kumari, who was the wife of the complainant, Gokul Prasad. The applicant appealed to the District Magistrate without success. He has now applied to this Court to set aside the conviction on two grounds, namely, that there is no evidence that he enticed the woman away and that she is not the lawfully married wife of the complainant. On the first point there are the concurrent findings of the courts below, and having looked into the evidence I see no reason to think that they are erroneous. On the second point it is conceded that the prosecution had to establish that Kharag Kumari was the wife of the complainant. The prosecution proved that the complainant married Kharag Kumari eleven or twelve years ago in Nepal, to which country both parties seem to

* Cr. Rev. No. 250 of 1912.

have originally belonged. The prosecution also proved that complainant and Kharag Kumari had lived together as husband and wife ever since the marriage, and that they had been recognized as husband and wife by their caste-fellows. There is also definite evidence that all the usual ceremonies were performed at the marriage. In these circumstances it seems to me that it must be presumed till the contrary is shown that Kharag Kumari is the lawful wife of the complainant. The applicant contended that she could not be the lawful wife of the complainant because she was the daughter of a Brahman by a mistress of the Banya caste, whereas complainant is a Banya of legitimate birth. Counsel for the applicant relied upon the decision of this Court in *Padam Kumari v. Suraj Kumari* ⁽¹⁾, that whatever may have been the case in ancient times, a marriage between a Brahman and Kshatriya woman is now invalid, and upon the opinions expressed by Mayne and other writers on the Hindu law that marriages between persons of different castes have long since become obsolete. It is not clear how far the prohibition of inter-marriage between castes applies to marriages between persons of hybrid castes or marriages between a person of hybrid caste and a Brahman or a Kshatriya or a Vaidya or a Sudra. According to Manu, Chap. X, verse 8, Kharag Kumari should be called a Ambasht'ha or Vaidya. In practice, however, it seems that child born of parents of different castes though an outcaste in the strict sense is regarded for many purposes as belonging to the caste either of its father or of its mother. There is no evidence as to whether Kharag Kumari was regarded as a Brahman or a Banya, but if, as is possible, even probable, she was regarded as belonging to the Banya caste, there would, even according to modern usage, be no obstacle to a marriage between her and the complainant, though the latter would perhaps be lowered in social estimation by such a marriage. Dr. Gurudas Banerjee in his work on the Hindu law of marriage, 2nd Edition, p. 73, says "At the present day when caste has become so elastic and loss of caste so rare, the general question whether an outcaste is eligible for marriage at all, and, if so, in what caste is not of much practical

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(1) [1908] I. L. R., 28 All., 458.

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importance. The only case of some difficulty is that of a person who is born of parents belonging to two different castes. But even in these cases which, however, are by no means common, the child if recognized by relatives and others as belonging to the caste of either parent and is married in that caste.....And it may, perhaps, be laid down as a general rule that so far as prohibition of inter-marriage between different castes is concerned, a marriage would be valid or void according as the parties to it are or are not in point of fact recognized as belonging to the same caste." According to this view of the law the marriage between the complainant and Kharag Kumari has been valid. If the rule against inter-marriage between persons of different castes were applied strictly, it is doubtful whether a person born of an illicit union between two Hindus, could contract a valid marriage at all. In the case of *Ram Kumari* ⁽¹⁾, the illegitimate child of Chattri parents had been married according to Hindu rites to a man who was by caste a Chattri. The High Court held that as the parties to the marriage had been recognized by their castemen as belonging to the same caste, the marriage was lawful, and they also laid it down that illegitimacy was no absolute disqualification for marriage in the case of Hindus. There is the further consideration in the present case that the parties belonged to Nepal where the Hindu Law of marriage may not be so strictly followed as it is in these Provinces. I have been referred to no authority which requires me to hold that the marriage in the present case was invalid. The applicant has failed to rebut the presumption that there was a valid marriage. In my opinion he was rightly convicted under section 498, Indian Penal Code.

I am asked to reduce the sentence on the ground that the applicant may have supposed that he was justified in regarding Kharag Kumari as the mistress, not the wife of the complainant. But there is nothing to show that the complainant or any one else has ever regarded her as a mistress. The application is rejected.

Application rejected.

(1) [1891] I. L. R., 18 Cal., 264.

CHAUHARJA SINGH

versus

SARABJIT.*

Landlord and tenant—Civil and Revenue Courts—Jurisdiction.

The plaintiff sued in the Revenue Court to eject the defendant saying that he was a tenant from year to year. The defendant pleaded that he had bought the property from H, who had his house on the land. The Assistant Collector dismissed the suit observing that the defendant had the first claim to hold the land on payment of rent but that the status of the defendant must be determined by a competent court. The plaintiff accordingly brought the suit in the Civil Court and it was dismissed : *Held*, that the suit was maintainable.

Narain Singh v. Gobind Ram, [1911] 8 A. L. J. R., 431, distinguished.

SECOND APPEAL from decree of Babu Prem Bihari, Subordinate Judge of Jaunpur, reversing a decree of Munshi Harbandhan Lal, City Munsif.

Haribans Sakai, for the appellant.

Satya Chandra Mukerji, for the respondent.

The following judgment was delivered by

CHAMIER, J.—In this case the Subordinate Judge held that the plaintiff had no right to sue as *thekadar*. That decision was reversed by Mr. Justice KARAMAT HUSAIN, who remanded the case to the lower appellate court for the determination of the remaining issues. The Subordinate Judge has now dismissed the suit on another ground, namely, that the suit is not maintainable in the Civil Court. The plaintiff again appeals to this Court. The Subordinate Judge finds support for his view of the case in the decision of KNOX and KARAMAT HUSAIN, JJ., in *Narain Singh v. Gobind Ram* (1). In that case the plaintiff went first to the Revenue Court saying that he was an occupancy tenant and the defendant was his sub-tenant. The Revenue Court dismissed his application for the ejectment of the defendant. The plaintiff then came into the Civil Court alleging that the defendant had been

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1912.

May, 30.

CHAMIER, J.

Chamier, J.

* S. A. No. 1226 of 1911.

(1) [1911] 8 A. L. J. R., 431.

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1912.

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Singhv.
Sarabjit.

Chamier, J.

his sub-tenant, but had become a trespasser, because he had pleaded in the Revenue Court that he was not the sub-tenant of the plaintiff, but was himself an occupancy tenant of the land, and the Revenue Court had so held. This Court held that the plaintiff was not entitled to maintain the civil suit. I am not quite sure that that decision is in accordance with other decisions of this Court, but it does not appear to me to cover the present case. Here the plaintiff sued in a Revenue Court to eject the defendant, saying that he was a tenant from year to year. The defendant replied that he had bought the property from one Harbansa, and that Harbansa's house formerly stood on the plot. The Assistant Collector, after referring to the *wajib-ul-arz*, said that he thought that the case was not a clear one and that the question should be tried out by a competent court with reference to the customs of the village; but then he went on to say:—"Prima facie I hold that the defendant has the first claim to hold the land on payment of rent," and then he says that the plaintiff should first have the status of the defendant determined. He dismissed the suit. It seems to me that, although he was inclined to hold that the defendant was entitled to become the tenant of the plaintiff, he was not sure that the defendant had become the tenant of the plaintiff, and he dismissed the suit, because in his opinion the Revenue Court could not decide the real question in the case, which could be solved only by inquiry into the customs of the village. There does not seem to me to be a definite finding that the defendant is a tenant of the plaintiff. The present case appears to me to be covered rather by the decisions in I. L. R., 22 All., 83 and 93, than by the decision in 8 A. L. J. R., 431, and I hold, therefore, that the plaintiff is entitled to maintain the present suit. On the last occasion when this case was remanded, the Subordinate Judge was directed to determine the remaining issues. Had he done so, I might have disposed of the case now. He has determined only the question of jurisdiction. I set aside the decree of the lower appellate court and remand the case to that court with directions to re-admit the appeal to its original number and dispose of it according to law. Costs here and in the lower appellate court will be the costs in the cause.

Appeal decreed—Cause remanded.

IBRAHIM
versus
RAM NARAIN.*

CIVIL,
1912.
May, 31.
CHAMIER, J.

*Evidence Act (1 of 1872), section 90—Practice—Presumption—
Evidence taken prior to presumption.*

In practice a court does not generally decide whether it will make the presumption or not under section 90 of the Evidence Act until all the evidence in the case is before it.

SECOND APPEAL from a decree of J. L. Johnston, Esq., District Judge of Aligarh, confirming a decree of the Munsif of Kasganj.

Girdhari Lal Agarwala, for the appellant.

The following judgment was delivered by

CHAMIER, J.—This was a suit for the recovery of Rs. 300 on the basis of a registered deed of mortgage. The plaintiff sued as the assignee of the original mortgagee. The defendants were the descendants of the mortgagor. It appears that the plaintiff produced evidence that the writer of the deed and all the marginal witnesses were dead, that the deed was in the handwriting of the person, who purported to have written it out, and that the signatures of the witnesses were in their handwriting. On a consideration of all the evidence the Munsif decided that it was safe to make the presumption permitted by section 90 of the Evidence Act, the deed being one 35 years old. He found that the document was genuine, and he held that it was for the defendants to rebut the admission made by the executant of the deed at the time of registration that he had received the consideration.

Chamier, J.

Both the courts below have held that the deed was supported by consideration.

In second appeal two points are taken.

The first point is that the recital of the consideration and the admission as to the receipt of consideration are

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not evidence against the defendants, that the deed was for consideration. It is quite clear that the recital in the deed and the admission are evidence against the defendants, who claimed through the executant of the deed. The second point is that inasmuch as the Munsif allowed evidence to be given that the deed was in the handwriting of the person who purported to have written it, and that the signatures of the witnesses were in the handwriting of those persons, he could not make the presumption allowed by section 90 of the Evidence Act. I was referred to section 4 of the Evidence Act, which runs as follows:—"Whenever it is provided by this Act that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved or may call for proof of it." On the strength of this it is argued that if a court allows evidence to be given as to the genuineness of a document, then he cannot make the presumption allowed by Section 90.

I have no hesitation in overruling this contention. It is just as well for a court to take any evidence that is available before deciding whether or not it will make the presumption allowed by Section 90 of the Evidence Act.

In practice a court does not generally decide whether it will make the presumption or not until all the evidence in the case is before it. The evidence that was taken in the present case certainly tended to show that it was safe to presume that the document was genuine.

The appeal is dismissed.

*Appeal dismissed
under O. 41, R. 1.*

THAKUR PRASAD RAI AND OTHERS

versus

NARENDRA BAHADUR SINGH AND OTHERS.*

Civil Procedure Code (Act V of 1908), Order XLI, Rule 25—Issues referred for determination—Transfer.

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BANERJI, J.

Where issues have been referred by the appellate court, and before the findings were returned, the appellate court transferred the case to another court to whom the original court submitted the record, *held* that the decision was without jurisdiction.

Udit Narain Singh v. Jhanda, I. L. R., 15 All., 315.

Kumarasami v. Subbaraya, I. L. R., 23 Mad., 314, followed

SECOND APPEAL from a decree of Babu Jagat Narain, Subordinate Judge of Gorakhpur, reversing a decree of Pandit Piya Lal, Munsif of Bansgaon.

Suit for possession of certain land opened out by the change of the course of a river.

The Munsif dismissed the suit. On appeal the District Judge remanded certain issues to the Munsif. After the findings were received, the District Judge remanded one more issue and before the finding on that issue was received, he transferred the appeal to the court of the Subordinate Judge who, after receipt of the finding from the Munsif, allowed the appeal and decreed the claim.

The defendants appealed.

Jang Bahadur Lal, for the appellant, contended that the District Judge having remanded certain issues to the lower court, had no power to transfer the appeal. He relied on

Udit Narain Singh and another v. Jhanda, [1893] I. L. R., 15 All., p. 315.

Also

Kumarasami Reddiar v. Subbaraya Reddiar and others, [1899] I. L. R., 23, Mad., p. 315.

* S. A. 1052 of 1911.

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Gulsari Lal, for the respondent, contended that the appellant ought to show under section 105, Civil Procedure Code, that though the order of transfer was bad, he has suffered any loss. Even if the order of transfer was bad, the appellant must be taken to have submitted to it as he never raised any objection. It is for the first time in this Hon'ble Court that this objection was raised.

The following judgment was delivered by

Banerji, J.

BANERJI, J.—I regret that I am obliged to set aside the decree of the court below and remand the case as the suit was brought so far back as the 29th of February, 1904. It was one for possession of land on the ground that it belonged to the plaintiffs and appertained to their village. The court of first instance, the Munsif of Bansgaon, dismissed the suit on the 30th of August, 1904. An appeal was preferred by the defendants to the District Judge of Gorakhpur. It was heard by him and issues were referred by him to the court below on the 19th of March, 1907. The Munsif recorded findings on the issues on the 21st of March, 1907. The learned Judge considered the findings to be insufficient and referred back the issues on the 4th of June, 1907. Meanwhile some of the parties died. The Munsif, thereupon, sent back the case to the District Judge in order that the legal representatives of the deceased might be brought on the record. On receipt of the record and before findings upon the issues referred to the court below had been returned, the learned Judge, by his order of the 16th of August, 1907, transferred the case to the court of the Subordinate Judge. That court, after considering the finding of the court of first instance on the issues referred by the District Judge, decided the appeal on the 14th of August, 1911.

From the decision of the Subordinate Judge this appeal has been preferred, and the first contention raised is that the order made by the District Judge for the transfer of the case which had been heard by him in part, was improper and without jurisdiction, and that the decision of the Subordinate Judge was consequently without jurisdiction also and must be set aside. This contention is supported by the ruling of

this Court in *Udit Narain Singh v. Jhanda*(¹). That was a case very similar to the present. In that case, as in this, the District Judge had made an order referring issues under section 566 of the Code of Civil Procedure, 1882. Before the return was made by the court of first instance, the District Judge transferred the case to the court of the Subordinate Judge. It was held that the appellate court was not competent to transfer the appeal for disposal by another court and was bound to decide the case itself. Reference was made to the last paragraph of section 566 and the first paragraph to section 567 of the old Code which have been re-enacted in the new Code of Civil Procedure, in Order 41, Rules 25 and 26. I am bound to follow this ruling, which is also consonant with the decision of the Madras High Court in *Kumarasami Reddiar v. Subbaraya Reddiar* (²). I, accordingly, set aside the order of transfer to the Subordinate Judge and the decree of the Subordinate Judge on appeal, and direct the District Judge to restore the appeal to the file of pending appeals in his own court and to dispose of it according to law. Costs here and heretofore will abide the result.

Appeal allowed.

(1) [1893] I. L. R., 15 All., 315.

(2) [1899] I. L. R., 23 Mad., 314.

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June, 10.

BANERJI, J.

INAYAT KHAN

versus

MUHAMMAD YUSUF.*

Pre-emption—Mahomedan law—Talab-i-ishtishad—Demand made before seller put in possession—Whether sufficient.

In a suit for pre-emption based upon the Mahomedan law the pre-emptor made his demand by invocation of witnesses in the presence of the seller who was not in possession of the property, *held* that the demand had not been properly made.

SECOND APPEAL from a decree of W. G. D. Burkitt, Esq., District Judge of Saharanpur confirming a decree of the Additional Munsif of Saharanpur.

Plaintiff's appeal arising out of a suit for pre-emption according to Mahomedan law.

The Additional Munsif dismissed the suit holding that the plaintiff failed to perform the formalities required by the Mahomedan law. On appeal, the District Judge confirmed the decree of the Additional Munsif holding that the plaintiff failed to sufficiently comply with the requirements of Mahomedan law inasmuch as the pre-emptor made the *talab-i-mowasibat* and the *talab-i-ishtishad* in the presence of the vendor alone who had parted with the possession of the property. The District Judge found further that at the time of the sale in question the property was in the possession of the minor vendee's father in the capacity of a tenant.

In second appeal

Nihal Chand, for the appellant, contended that the property being in possession of a man who held it as a tenant of the vendor, the vendor was not out of possession, and the declaration made in his presence was sufficient. Further, that it was not material whether the vendor was in possession or not. It was enough if the formalities were performed in presence of the vendor or the vendee or on the premises.

* S. A. No. 1294 of 1911.

He referred to

Wilson's Digest of Anglo-Mahomedan law, p. 393.

Jadunundan Singh v. Dulput Singh and others, [1884] I. L. R., 10 Cal., 581.

Lachmi Narayan (for *J. Simeon*), for the respondent, was not called upon.

The following judgment was delivered by

BANERJI, J.—This appeal arises out of a claim for pre-emption based on Mahomedan law. The suit was also based on custom, but the courts below found that the alleged custom was not proved, so that the claim is one under the Mahomedan law, and the only question is, whether the requirements of that law as to preliminary demands have been complied with. It is admitted that the first demand (*talab-i-mowasibat*) was performed. The dispute between the parties relates to the performance of the second demand, viz., *talab-i-ishtishad*, or invocation in the presence of witnesses. The rule ordinarily is that this demand should be made in presence of witnesses either before the vendor or the vendee or on the premises. In this case the demand was not made in the presence of the vendee or on the premises, but it was made in the presence of witnesses before the vendor. The question is, whether such a demand is valid under the Mahomedan law. It seems on the authorities that the validity of a demand made in the presence of witnesses before the vendor is subject to the further qualification that the vendor must have been in possession of the property sold at the time of the demand.

In Ameer Ali's Muhammadan Law, Vol. I, page 607, it is said:—"In order to perform this ceremony (*talab-i-ishtishad*) the pre-emptor must take some witnesses with him to the vendor, *if the property sold be still in his possession*, or to the vendee or to the property which is the subject-matter of the claim." In Baillie's Muhammadan Law, it is laid down on page 484, that "if possession has not been taken of the thing sold, the pre-emptor has an option, and may, if he please, make the demand in the presence of the seller or on the premises; or he may make it in the presence of the purchaser, though he is not in possession, because he is the actual proprietor." In the Hedaya, Vol. III, Book xxxviii, Chapter II, p. 571, it is

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said, "It is, therefore, necessary afterwards to make the *talab-i-ishtishad wa Takreer*, which, as done by the *Shafee* taking some person to witness, either against the seller, *if the ground sold be still in his possession*, or against the purchaser or upon the spot regarding which the dispute has arisen; and upon the *Shafee* thus taking some person to witness, his right of *Shufa* is fully established and confirmed." In Macnaghten's Principles of Muhammadan Law, p. 181, the answer to question No. 1 was that *talab-i-ishtishad* should be made on the premises or before the seller or purchaser, whichever of them is in possession. So that it is clear upon all these authorities, that the demand would not be a valid demand if it is made in the presence of the seller only unless the seller was in possession. If the vendee had been put into possession, a demand in the presence of witnesses made before the seller and not before the vendee, would not be valid. In this respect the view taken by the court below seems to be correct. It has been found that the vendee was in possession. As a matter of fact, a lessee of the vendor was in actual possession, but from the date of the sale the proprietary title having been passed to the vendee, the possession of the lessee was the possession of the vendee. As the second demand was not made in the presence of the vendee or on the premises, the requirements of the Mahomedan law were not complied with, and the plaintiff's suit was rightly dismissed. I dismiss the appeal with costs.

Appeal dismissed.

MUHAMMAD IBRAHIM

versus

RAMKISHUN RAI AND ANOTHER.*

Landlord and tenant—Ex-proprietary tenancy—Relinquishment of holding—Whether person relinquishing becomes tenant of all proprietors—Decree for joint possession.

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CHAMIER, J.

One J. sold his zemindari including *Sir*. He also relinquished his ex-proprietary holding in favour of the predecessors-in-title of the plaintiff. The plaintiff not having obtained possession, brought a suit for exclusive possession of the holding.

Held, that J. became the tenant of all the proprietors and the relinquishment of his ex-proprietary holding enured for the benefit of all the co-sharers, and the plaintiff was not entitled to proprietary rights in the land to the exclusion of the co-sharers.

Whether, however, he should get joint possession would depend upon the circumstances, and the mere fact that he never had been in possession was not a sufficient reason for refusing him the relief.

SECOND APPEAL from a decree of Munshi Chhajju Mal, Subordinate Judge of Ghazipur, confirming a decree of Babu Gobind Sarup Mathur, Munsif of Muhammadabad.

Suit for exclusive possession.

The facts and arguments appear from the judgment.

Muhammad Ishaq, for the appellant.

Gobind Prasad, for the respondents.

The following judgment was delivered by

CHAMIER, J.—The facts of this case are that one Jobraj Rai sold part of his share in a village to the predecessor of the plaintiff in 1875 and sold the remainder of the share to the defendants in 1881.

Chamier, J.

Jobraj Rai became ex-proprietary tenant of 12 bighas odd which included the three plots now in suit. Jobraj Rai relinquished his holding in favour of the predecessor of the plaintiff, and it is on the strength of that relinquishment that the plaintiff has now sued for exclusive possession of the three plots.

* S. A. No. 1237 of 1911.

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Rai

Chamier, J.

According to the decisions of this Court, Jobraj Rai was tenant of all the proprietors, and the relinquishment of his ex-proprietary holding by him enured for the benefit of all the co-sharers. The plaintiff is certainly not entitled to proprietary rights in the land to the exclusion of the defendants. The plaintiff and the defendants are co-sharers of the land and the question is whether the plaintiff is entitled to a decree for joint possession with the defendants. One of the reasons given by the lower appellate court for refusing to give him such a decree is that he has never been in possession. This is not a sufficient reason. See the recent decision of this Court in *Jagan Nath Ojha v. Ram Phal and others* (1). The circumstances must be considered. It has been found that the defendants have been in undisturbed possession of two of the plots for over twelve years and of the third since 1904. In these circumstances I agree with the courts below that the plaintiff is not entitled to a decree for joint possession with the defendants. He must be content with getting his share of the profits of the plots on a settlement of accounts of the profits of the estate of which the plots form part. The appeal is dismissed with costs.

Appeal dismissed.

(1) [1911] 8 A. L. J. R., 1312.

NARAYAN DEI

versus

DURGA DEI AND ANOTHER.*

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May, 27.

KNOX, J.

Civil Procedure Code (Act V of 1908), section 66—Suit against certified purchaser—Successor-in-title of benamidar—Suit not maintainable.

Section 66 of the Code of Civil Procedure is intended to preclude the institution of a suit against the certified purchaser by the beneficial owner or the successor-in-title of the beneficial owner.

SECOND APPEAL from a decree of H. W. Lyle, Esq., District Judge of Agra, modifying a decree of Khwaja Abdul Ali, Additional Subordinate Judge of Agra.

Suit for possession. The facts and arguments are set out in the judgment.

Shiam Krishna Dar, for the appellant.

Tej Bahadur Sapru, for the respondents.

The following judgment was delivered by

KNOX, J.—In order to understand this appeal, it will be better in the beginning to set out, that one Bhola Nath had a wife, named Musammat Sunder Dei. Of these two, were born four ladies, Musammat Narain Dei, Musammat Durga Dei, Musammat Uttam and Musammat Piari. Bhola Nath died leaving his widow, and these four ladies him surviving. Musammat Sunder Dei is now dead, and the dispute relates to property which is said to be the property of Musammat Sunder Dei. It will be well to note also, that the lady, Musammat Durga Dei, married one Baldeo. In this appeal the parties are Musammat Narain Dei, who was the plaintiff in the court of first instance, Musammat Durga Dei and her husband Baldeo. The property with which this appeal is concerned, is a house situate in Mohalla Mandi Said Khan in the city of Agra. This house was put up to sale, by the Civil Court at Agra. It was purchased—so the sale certificate sets out—by Baldeo. The sale certificate shows that it was sold subject to a lien of Rs. 119-14-0, arising out of a deed, dated

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* S. A. No. 674 of 1911.

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Knox, J.

June 3, 1891, of which one Ganga Prasad was the holder. Musammat Narain Dei came into court and asked for possession of this property as being part of the property left by Musammat Sunder Dei. After setting out the pedigree, she alleges that Musammat Sunder Dei, her mother, got possession of all the property left by Bhola Nath, and that in her life-time she purchased the house in dispute, adjoining the house left by Bhola Nath, and included it in one house. The purchase was made, she says, by Musammat Sunder Dei, out of the money which she had inherited, but she adds that the name of Baldeo was entered fictitiously. According to her, Musammat Sunder Dei always remained in possession of the property. She puts the cause of action as arising on the 10th March, 1907. In the written statement the defendants distinctly denied that the house in dispute was purchased by Musammat Sunder Dei; they deny that she was the owner of it, they specifically deny that the property was purchased fictitiously in the name of Baldeo, and that Musammat Sunder was never in adverse possession of it. The court of first instance holding that Musammat Sunder Dei was in the receipt and enjoyment of the rent of the house in dispute up to the date of her death, and that Baldeo had no right after her death—the date of wrongful possession as against the legal heirs of Musammat Sunder Dei—decreed the plaintiff's claim for possession of a one-third share in the house in dispute, and directed that it should be partitioned. In appeal, the lower appellate court held that section 66 of the Code of Civil Procedure of 1908 barred this suit. It held that Baldeo was the purchaser certified by the court, and in consequence decreed the appeal which had been brought by Baldeo and Durga Dei and modified the decree of the court of first instance, directing that the suit for possession by partition of the house in Mandi Said Khan be dismissed together with mesne profits for the same. Musammat Narain Dei comes here in appeal and contends, first, that section 66 of Act V of 1908 has no application; secondly, that the plea was for the first time raised in appeal, and the lower appellate court should not have entertained it. There is a third plea by which it is contended that the whole of the house in Mohalla Mandi Said Khan was not purchased by a sale of the Civil Court,

that only one-third of it was so purchased and the remaining two-thirds were the result of a private purchase. The fourth plea raised is one regarding the mesne profits of the house.

To take plea No. 2 first, the question raised is a question of law. The shadow of it had certainly been cast in the pleadings and, I think, the lower appellate court was fully justified in considering the plea. There remains the question how far section 66 of the Civil Procedure Code of 1908, is, or is not, a bar to the suit as brought. The contention of the appellant, as I understand it, is that this is a suit by an heir claiming inheritance to the property left by Musammat Sunder Dei, that section 66,—if it applies at all,—allows a suit of this kind to be brought under the second clause of the same section. The contention was that when Musammat Sunder Dei purchased the property in the name of Bhola Nath, the appellant as her reversioner, could have brought a suit to challenge this act, and she is within her rights in so doing after Musammat Sunder Dei's death. The plea raised is a very ingenious one, but it does not seem to me to be strong enough to take it out of the clear words of section 66. The first clause of section 66 is practically the same as the old section 317, clause (1). That clause has been the subject of several rulings by this Court, one of them being a Full Bench ruling. The words used in section 317 were the subject of careful consideration by five Judges of this Court, and they arrived unanimously at the conclusion that this section was intended to preclude the institution of a suit against the certified purchaser, by the beneficial owner or the successor-in-title of the beneficial owner. In the present case, the beneficial owner is said to have been Musammat Sunder Dei. The appellant, if she has any standing, is a successor-in-title of the beneficial owner, and unless the Code of Civil Procedure of 1908 has introduced any change, the ruling of this Court holds that she, the appellant, is precluded from instituting a suit against Baldeo. But it is contended that the second clause of section 66 enables the suit to be brought. There is no doubt that Act V of 1908 has introduced new words which did not exist in the second clause of old section 317. So far, I am with the learned counsel for the appellant, but I confess considerable

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difficulty in following him, as he applies the new words to the present case. Is this a case in which a third person is claiming to proceed against property sold ostensibly to a certified purchaser for a *benamidar* on the ground that he is liable to satisfy a claim of the third person against the real owner? Take it that the real owner was Musammat Sunder Dei. What claim has Musammat Narain Dei against Musammat Sunder Dei which gives her a right to proceed against this property though ostensibly sold to Baldeo? It is to meet this, that her position as reversioner is put forward. It seems to me that it would require a great deal of twisting, to make these words fit in with the claim as now brought. My attention was directed to the case of *Achhaibar Dube v. Tapasi Dube* ⁽¹⁾. In that case, the finding of this Court was that the purchase was not a purchase made secretly by one person for another,—the ostensible purchaser having no interest in the purchase, and the real purchaser wishing for some reason that his name should not appear. In other words, the finding of the court was, that it was not a *benami* purchase. In the present case, however, the contention right through, of the appellant—as the lower appellate court points out—has been, that Baldeo was a *benami* purchaser for Musammat Sunder Dei and with her knowledge. An attempt was made to bring the present case within the purview of two rulings of the Madras High Court—*Monappa v. Surappa* ⁽²⁾ and *San-kunni Nayar v. Narayanan Nambudri* ⁽³⁾, and the contention was, that section 66 applies not to purchases made by an agent and does not apply when possession has been transferred. Neither of these views have, at any time, so far as I know, found favour with this Court.

There remains the third plea, viz., to the effect that one-third of the house in dispute was the purchase made at the auction held by the Civil Court and two-thirds were the subject of a private purchase. The purchase is one of a nature similar to that which is made, times out of number, in Civil Court sales. I have been referred to no authority which held that under the circumstances of this kind, namely, where

(1) [1907] I. L. R., 29 All., 557.

(2) [1886] I. L. R., 11 Mad., 234.

(3) [1893] I. L. R., 17 Mad., 282.

property is sold subject to a lien, that the purchaser purchased one fraction at the Civil Court sale and the remaining fraction when he paid off the lien. What the purchaser purchased is the whole of the property, subject to any demands that may be made by the lien advertised at the time of the auction. The appeal fails and is dismissed with costs.

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Appeal dismissed.

MADAN LAL

versus

CHUTTAN SINGH AND OTHERS.*

Compromise—Family arrangement—Settlement of doubtful rights—Life-tenant—Reversioners bound.

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BANERJI, J.

Held that a compromise in the nature of a family arrangement, entered into by a life-tenant selling doubtful rights which is fairly and properly obtained from her, is binding on the reversioners who are no parties to such arrangement.

FIRST APPEAL from a decree of Maulvi Muhammad Mubarak Husain, Subordinate Judge of Shahjahanpur.

J. N. Chaudri and Girdhari Lal Agarwala, for the appellant.

Motilal Nehru, Ghulam Mujtaba, Muhammad Ishaq and Ibn Ahmad, for the respondents.

The judgment of the Court was delivered by

RICHARDS, C. J.—This appeal arises out of a suit brought to recover possession of certain zamindari property. The property originally belonged to one Chandan Singh, who died on the 22nd of February, 1866. He left him surviving a widow, named Musammat Jasodha Kunwar, and three sons of a daughter, named Gulab Kunwar. There was also a lady named Mohan Kunwar. Plaintiffs Nos. 1 and 2 are her sons. The third plaintiff is a transferee from these sons, evidently a person who has taken a transfer and is financing the litiga-

Richards, C. J.

*F. A. No. 198 of 1910,

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tion. Mohan Kunwar, it is alleged by the plaintiffs, was also a daughter of Chandan Singh, but this is challenged by the appellants who say she was illegitimate. Gulab Kunwar predeceased Jasodha Kunwar, and Jasodha remained in possession of the property as the widow of Chandan Singh up to her death, which took place on the 16th of February, 1872.

After the death of Jasodha, the property apparently was taken possession of, by the collateral heirs of Chandan Singh. A suit was instituted by Jawahir and others, the sons of Gulab Kunwar, to recover possession of the property, and after some litigation a decree for possession was obtained. Mohan Kunwar, who, of course, would have been entitled to the property in priority to the sons of Gulab Kunwar, assuming her to be the legitimate daughter of Chandan Singh, apparently lay by, and took no part in the litigation. She apparently was not recognised by the sons, nor did she put forward any claim on her own behalf. After the property had been recovered, however, some claim must have been put forward by, or on behalf of Musammat Mohan Kunwar, because in the year 1876 we find that a submission to arbitration was entered into between Musammat Mohan Kunwar on the one part and the sons of Gulab Kunwar on the other. This submission to arbitration recited that there were disputes between Musammat Mohan Kunwar and the sons of Gulab Kunwar, in regard to the property of Chandan Singh, in respect of which a decree had lately been obtained, and the parties submitted their differences to arbitration with a view to have their disputes settled. The nature of the dispute does not appear, and we think, that if there was any question as to the legitimacy of Musammat Mohan Kunwar, it is probable the matter would be set forth vaguely as a dispute and would not be directly referred to. An award was made giving to Musammat Mohan Kunwar four villages, in value about one-seventh of the property. The rest of the property was given to the sons of Gulab Kunwar, and one Bal Makund, who had been a co-plaintiff with them, in their successful suit to recover possession of the property. This award was made a rule of court. Ever since, until this suit was instituted possession has gone in accordance with this award. It cannot be urged, we think, that Musammat Mohan Kunwar

was tricked or induced to sign the submission to arbitration and an award knowing nothing about it. She was probably a *pardanashin* lady and illiterate, but we find that her husband was her general attorney and he signed her name on the award as such. A son of Mohan Kunwar, who was evidently of full age, identified her at the registration of the power of attorney to the father. As a matter of fact, Musammat Mohan Kunwar lived until the 17th of October, 1908. The award has been acted upon ever since. On the death of Musammat Jasodha and after the property had been recovered by the sons of Gulab if there had been no question as to the title of Musammat Mohan Kunwar, she would have been entitled to immediate possession of the entire property during her life, and on her death her sons, as the daughter's sons of Chandan Singh, would also have been entitled to share in the estate with their cousins. Therefore not only was it the interest of Mohan Kunwar that she should get the property if she was entitled to it in the year 1876, but it was also the interest of her husband and her sons. She, no doubt, would be the legal owner, but for all practical purposes, they would share at least equally with her the benefit and profits of the estate. From the year 1876 up to the time of the institution of the present suit, the award has never been challenged, either by Musammat Mohan Kunwar herself or by any one of her four sons. There are two sets of defendants to the present suit. First, the transferees from the sons of Gulab Kunwar of the property which they acquired under the award, and secondly, transferees from Mohan Kunwar herself of the property which was allotted to her. The court below has decreed the plaintiff's claim in respect of all the property which was alienated by the sons of Gulab Kunwar. It also decreed the claim for such of the property as was alienated by Musammat Mohan Kunwar in the alienation of which her son did not join or in respect of which legal necessity for alienation was not proved.

The defendants have appealed against the decrees for possession in this and some of the connected appeals. The plaintiff has also preferred an appeal in respect of so much of the claim as was dismissed.

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In our opinion, the whole case depends upon whether the submission to arbitration and the award can be regarded as a family settlement which ought to be given effect to. It is, of course, impossible now, for the transferees of the sons of Gulab Kunwar, to prove that Mohan Kunwar was illegitimate. They are strangers to the family, and it is no longer the interest of the family to help them. In our opinion, the transaction was a family arrangement and ought to be regarded as such. We have already mentioned the circumstances under which the submission to arbitration was entered into. We have pointed out that it has been acted upon for very many years, and we think that it would be very wrong to disturb the possession of those persons who have acquired the property on the strength of the submission and award. There cannot be the least doubt that the award was acted upon and that Musammat Mohan Kunwar and her sons took possession of the property that was allotted to her, while the sons of Gulab Kunwar were allowed to take possession and deal with the property which was allotted to them.

It is contended on behalf of the plaintiffs that this plea of family arrangement is not open to the defendants, and reliance is placed upon paragraph 9 of the written statement. In the written statement of those defendants who claimed through the sons of Gulab Kunwar, it is alleged that Musammat Mohan Kunwar was illegitimate. Paragraph 9 goes on to say that the arbitration and award were fictitious and colourable. It is contended by the plaintiffs that so far from relying upon the award as a family settlement, this set of defendants at least were alleging the whole transaction to be fictitious. In our opinion, there is no substance in this contention. It never was, or could be, the case of any of the defendants that the submission to arbitration and award were fictitious in the sense that they were never acted upon. It was the common case of both sides that the award was acted upon for very many years, and there is not the least doubt that numerous transfers of the property have taken place on the strength of it, some of the transfers being made by Mohan Kunwar and her sons, and some by the sons of Gulab Kunwar. The real

meaning, we think, of paragraph 9 of the written statement was, that the award was really a colourable method adopted by the parties of giving Musammat Mohan Kunwar a small share in the property in consideration of her relinquishing all claim to the remainder. They also referred to section 115 of the Evidence Act as being a bar to the plaintiffs claim, that is to say, they raised a plea of estoppel. This, we think, shows that the real meaning of paragraph 9 was the meaning we have attributed to it. As a matter of fact, the set of defendants who represented the transferees from Musammat Mohan Kunwar herself and her sons, did rely on the submission to arbitration and award as a family settlement, and the court framed an issue on the point. It is true that this set of defendants raised the plea for another purpose, namely, as being a ground for their claiming the property as being the absolute property of Musammat Mohan Kunwar and not property to which she was merely entitled for a daughter's estate. We do not think it can be urged that any one is now being taken by surprise or that the full facts are not before the court. Having regard to the circumstances of the present case and the fact that the submission to arbitration, award and subsequent alienations were never challenged up to the institution of the present suit, we are entitled to assume that in the year 1876 there was a genuine and real dispute between the parties, whether that dispute had reference to the legitimacy of Musammat Mohan Kunwar or to some other matter. The submission to arbitration referred these matters to the settlement of arbitrators, and an award was made by consent of parties, and that award was made a rule of court. We think that this can clearly be regarded as a family settlement, and that it fulfils the test approved of, and laid down by their Lordships of the Privy Council in *Khunni Lal v. Gobind Krishna Narain* (1). In the present case just as in the case referred to by their Lordships of the Privy Council, the true character of the whole transaction was a settlement between several persons of their disputes, whatever those disputes may have been. This being so, the transaction was binding not only upon the actual parties to it but the family.

(1) [1911] I. L. R., 33 All., 356, at p. 367.

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We, accordingly, allow the appeal, set aside the decree of the court below, and dismiss the plaintiff's claim as against Madan Lal, the appellant in this case, with costs, in both courts.

Appeal allowed.

CIVIL.

1912.

May, 28.

CHAMIER, J.

MUSADDI LAL AND ANOTHER

versus

JWALA PRASAD AND OTHERS.*

Civil Procedure Code (Act V of 1908), section 11, Explanation II.—Res judicata—Previous suit deciding question of title of the nature cognizable by a Court of Small Causes—No appeal from the decision—

A suit was brought for damages on account of the fruit of a certain grove. The suit was dismissed as the plaintiff had no title to the grove. This suit being of the nature cognizable by a Court of Small Causes, no second appeal lay. In a subsequent suit, for possession of the same grove, and damages on account of the fruit, *held* that the suit was barred by rule of *res judicata* by virtue of the decision on the question of title in the previous suit and it was immaterial under section 11, Explanation II, of the Code of Civil Procedure, that no second appeal lay in the previous suit.

SECOND APPEAL from a decree of Saiyid Hidayat Ali, Second Additional Judge of Meerut, confirming a decree of Pandit Pearey Lal Katara, Extra Additional Munsif of Ghaziabad.

Suit for possession and damages.

The facts and arguments appear from the judgment.

Satya Chandra Mukerji, for the appellants.

Vishun Ram Mehta, for the respondents.

The following judgment was delivered by

Chamier, J.

CHAMIER, J.—This was a suit for possession of a grove and Rs. 50, the alleged value of the fruit of the grove taken by the defendants during the three years immediately preceding the suit. The suit has been dismissed on the ground that it is barred by a decision in a previous suit.

* S. A. No. 1190 of 1911.

The previous suit was brought by Hardial and his son, Banke Rai, to recover damages on account of the fruit of the grove alleged to have been wrongly taken by the defendants. That suit was dismissed because the plaintiffs failed to prove their title to the grove or that it ever was in their possession. The present suit was brought by Banke Rai and other descendants of Hardial, who were either not born or were very young children at the date of the previous suit. There can be no doubt, I think, that such of the plaintiffs as were alive at the date of the previous suit, were sufficiently represented by Hardial. Those who were born since the date of the previous suit, are clearly bound by that decision so far as the question of the parties is concerned.

‘It is argued that the decision on the question of title in the previous suit did not render that question *res judicata*, because the previous suit was of a nature cognizable by a Court of Small Causes and because the decision on the question of title was only incidental. The previous suit was not tried by a Court of Small Causes, but was tried by an ordinary Civil Court, and under section 11 of the Code of Civil Procedure, explanation II, it is quite clear that the fact that no second appeal lay in previous suit is no ground for holding that the decision in the previous suit does not render the question *res judicata*, nor can I accept the argument that the decision on the question of title was only incidental. It was, in my opinion, the most important question in the case. The circumstance that the relief claimed in this case differs from the relief claimed in that case is immaterial. The crucial question in both cases was the question of the plaintiff's title. The decision in *Anwar Ali v. Nurul Haq* ⁽¹⁾ and the decisions therein quoted rest, partly at all events, on the view that a decision in the course of a suit of a nature cognizable by a Court of Small Causes does not render the question of title decided therein *res judicata*. The point was one on which there was considerable difference of opinion, but it has been settled by the new Code of Civil Procedure. In my opinion, the decision of the courts below is correct. The appeal is dismissed with costs.

Appeal dismissed.

(1) [1907] 27 A. W. N., p. 218.

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1912.

Musaddi Lal
v.

Jwala Prasad.

Chamier, J.

CIVIL

1912.

May, 28.

KARAMAT
HUSAIN, J.
TUDBALL, J.

LALAK SINGH

versus

AJUDHIA PRASAD AND ANOTHER.*

Burden of proof—Mortgage-bond—Proof of execution and payment of consideration—Evidence—Recital in instrument.

G executed a mortgage-deed in favour of *R*. *G* sold the property to *L*. The mortgage-deed contained an admission of the receipt of consideration which consisted of old debts. The heirs of *R* brought a suit upon their mortgage, and impleaded *G* and *L*. *G* admitted execution, but denied receipt of consideration, but *L* denied both: *Held*, whether the admission of *G* contained in the deed was evidence against *L* or not, nevertheless the burden of proof was primarily on the plaintiffs to establish payment of consideration and as against the transferee who was no party to the bond and had no sufficient knowledge of the circumstances under which the document was executed that admission was of very little value and was insufficient to shift the burden of proof on to the transferee.

APPEAL from an order of Shaikh Muhammad Ali, District Judge of Banda, remanding the suit on appeal from the decree of Lala Achal Bihari, Subordinate Judge.

Suit upon a mortgage.

The facts were as follows :—Ganraj executed a mortgage-deed in favour of the plaintiff's ancestor. The mortgaged property, together with other property, was subsequently sold by Ganraj to Lalak Singh. The plaintiffs brought a suit upon the basis of the mortgage bond, making Ganraj and Lalak Singh defendants. In the mortgage-deed there was a recital of receipt of consideration which consisted, mainly, of old debts. Ganraj admitted execution of the mortgage bond but denied receipt of any consideration. Lalak Singh denied both execution and consideration. The parties produced no evidence as to receipt or non-receipt of consideration. The Subordinate Judge held that the execution was proved, but that the plaintiffs had not discharged the burden that lay upon them of proving consideration, and dismissed the suit. On appeal, the District Judge held that

* F. A. F. O. No. 7 of 1912.

the onus of proof as regards consideration lay on Ganraj and not on the plaintiffs, and remanded the suit. Lalak Singh appealed to the High Court against the order of remand.

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Uma Shankar Bajpai, for the appellant :—The admission of the original mortgagor cannot be binding on the transferee who was no party to the mortgage transaction. The recital of receipt of consideration in the bond may or may not be conclusive against the party who made it; it, no doubt, is evidence against him and is sufficient to shift the burden of proof so far as he himself is concerned. But it is not binding upon a third person and does not shift the burden of proof as against him.

Manohar Singh v. Sumitra Kuar, [1895] 15 A. W. N., 93. (S. C. I. L. R. 17 All., 428.)

Purushottam Das Tandon (for *Damodar Das*), for the respondents :—A representative in interest of a person has no higher status than the person whom he represents. So, the transferee can claim no better position than the mortgagor himself; and the latter is bound by the recital, and the onus of proof as to absence of consideration is on him. I rely on section 102, illustration (2) of the Evidence Act, and on

Mahabir Prasad Rai v. Bishan Dayal, [1904] 24 A. W. N., 163.

I am also supported by the principle laid down in

Muhammad Musamilullah Khan v. Mithu Lal, [1911] 8 A. L. J. R., 901, F. B.

The case of a transferee from the original mortgagor is analogous to that of a son of the mortgagor; both of them are representatives in interest of the original mortgagor and should be equally affected by admissions of his.

[KARAMAT HUSAIN, J.—But a transferee is not his representative in interest in the same sense as his son would be.]

So far as the interest in the mortgaged property is concerned, the transferee is the representative in interest of the mortgagor, just as much as his son would be.

[KARAMAT HUSAIN, J.—The transferee is not a representative so far as the debt, or the receipt of consideration therefor, is concerned.]

As regards the case relied on by the appellant, it was a case of an auction-purchaser and not that of a private trans-

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feree ; and an auction-purchaser was, at that time, regarded as not being a representative in interest of the judgment-debtor. In a later case, it has been held that even an auction-purchaser is bound by the recitals of the judgment-debtor.

Baranashi Pershad v. Birj Lall Singh, [1899] 3 C. W. N. (Notes, p. cccxxiv.

If an auction purchaser is, as has been held, a representative in interest of the person whose property he has purchased, *a fortiori* a private purchaser is such a representative, and section 21 of the Evidence Act applies to him.

Uma Shankar Bajpai, in reply :—The case in 3 C. W. N., cited by the respondents, has been dissented from in the case of

Bisheswar Dayal v. Harbans Sahay, [1907] 6 C. L. J. R., 659.

The case of

Brajeshwari Peshakar v. Buddhanuddi, [1880] I. L. R., 6 Cal., 268 ; and

Ghurphekni v. Purmeshar Dayal, [1907] 5 C. L. J. R., 653, at 658, are in my favour.

The judgment of the Court was delivered by

Tudball, J.

TUDBALL, J.—This appeal arises out of a suit for sale upon a mortgage, dated the 30th of September, 1896, executed by Ganraj Gir in favour of Ram Sahai, the predecessor in title of the plaintiffs, for Rs. 133, with interest. Subsequently to the mortgage the mortgagor sold the property to one Lalak Singh. The plaintiffs made both the mortgagor and the transferee parties to the suit. The court of first instance dismissed the suit holding that the plaintiffs had failed to prove consideration. It placed the burden of proof on the plaintiffs to establish consideration for the bond. The mortgagor admitted execution of the deed but denied receipt of consideration. The transferee put the plaintiffs to the proof of both execution and consideration. The plaintiffs produced one witness who testified simply to the execution of the deed, but knew nothing as to consideration for the bond. On appeal the lower appellate court held that the burden of proof was not on the plaintiffs to establish consideration for the deed, but that the burden of proving non-payment of consideration was on the defendant transferee. In this view, it set aside the decree of the court

of first instance and remanded the case for trial under Order 41, Rule 23. On appeal by the transferee it is pleaded that the burden of proof is really on the plaintiffs, and that the evidence which they have produced has not shifted the onus on to the defendant-transferee of proving non-payment of consideration. It is contended that the admission contained in the bond by the mortgagor is no evidence as against the appellant who is a transferee from the latter. There has been considerable discussion on the question whether the admission in the bond is admissible in evidence as against the transferee, the present appellant. In our opinion, for the purposes of this case, it is unnecessary to actually decide the point. In the present case the transferee is a person who has taken property by private sale from the mortgagor, and it may well be contended that he is a representative-in-interest of the mortgagor within the meaning of section 21 of the Indian Evidence Act. Assuming, however, without deciding the point that this admission is evidence as against the present appellant, nevertheless the burden of proof in such a case is primarily on the plaintiffs to establish payment of consideration, and as against the transferee who is no party to the bond and has no sufficient knowledge of the circumstances under which it was executed, that admission is of very little value, and in our opinion is insufficient to shift the burden of proof on to the defendant-transferee. In the case now before us, the major part of the consideration consisted of old debts due on former bonds. The plaintiffs had ample opportunity and ample means, if the bond were a true one, of clearly proving the old debts and of establishing payment of consideration. In our opinion, the evidence which they produced was totally insufficient to establish such payment, and the court of first instance was quite right in primarily placing the onus of proof upon them and in holding that the burden of proof had not been shifted. We, therefore, admit the appeal, set aside the decree of the court below, and restore that of the court of first instance. The appellant will have his costs in all courts.

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Lalak Singh
v.
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Tudball, J.

B. K. M.

Appeal allowed.

CIVIL.

1912.

May, 30.

CHAMIER, J.

BISHUMBHAR DAYAL

versus

PARSHADI LAL AND ANOTHER. *

Hindu Law—Joint family property mortgage by one member—Mortgage voidable—Mortgagor and mortgagee—Estoppel.

Held, that a mortgage by one member of a joint Hindu family of property belonging to the family is not void altogether, but is voidable at the instance of the persons whose rights are invaded by it, and that it is not open to a mortgagor as against his mortgagee to set up the invalidity of the mortgage.

SECOND APPEAL from a decree of S. R. Daniels, Esq., Additional Judge of Moradabad, confirming a decree of Babu Sidheshwar Mittra, Additional Munsif of Nagina.

Suit upon a mortgage.

The facts and arguments are set forth in the judgment.

Jang Bahadur Lal and *Gulsari Lal*, for the appellant.

Surendra Nath Sen, for the respondents.

The following judgment was delivered by

Chamier, J.

CHAMIER, J.—This was a suit by the respondents upon a mortgage made in their favour by the appellant on the 7th of December, 1895. On the date of the mortgage the appellant, with his brothers, Durga Prasad and Shiam Sarup and their children, constituted a joint Hindu family, and the appellant describes the property mortgaged as *Mushtarka-i-Durga Prasad, waghaira*. The respondents originally impleaded in this suit the appellant's brother, Shiam Sarup, but at their instance, his name was struck off the record, and the case proceeded against the appellant alone. The appellant put forward various defences, but the only one, which I need notice now, was that the mortgage was invalid inasmuch as the property was the property of the joint family. The Munsif held that this defence was not open to the appellant and decreed the claim in full against the appellant and directed that in case of non-payment the defendant's share in the

property should be sold. An appeal to the District Judge was dismissed. The District Judge also held that it was not open to the appellant to plead the invalidity of his own mortgage.

In second appeal, it is contended that the decisions of the courts below on this point are erroneous. It is pointed out that the mortgage itself discloses the fact that the mortgaged property was not the property of the mortgagor alone, but belonged to the joint family of which the appellant was a member. It seems to me that a mortgage of this kind is not void altogether, but is voidable only at the instance of the persons whose rights are invaded by it. With reference to certain cases which have been cited in the course of the arguments, there appears to be a distinction between a mortgage of a tenure such as an occupancy tenure in Agra, the transfer of which is forbidden by the legislature, and a mortgage of property, the transfer of which is not forbidden by the legislature but is voidable at the instance of other persons. The case appears to me to be covered by the decision in *Joti Prasad v. Asis Khan*⁽¹⁾, where it was pointed out by this Court that if the original mortgagor had been alive, he would not have been permitted to plead that he had no authority to make the mortgage. In that case the mortgagor had mortgaged not only his own share but the shares of his sisters in the property. The case of *Kedar Nath v. Nepal Singh*⁽²⁾ was the case of a mortgage of a tenure, the transfer of which was forbidden by the legislature. The third and fourth grounds of appeal have been abandoned. The decision of the lower appellate court appears to me to be correct. I dismiss the appeal with costs.

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Ohamier, J.

Appeal dismissed.

(1) [1909] 6 A. L. J. R., 5. (2) [1911] 8 A. L. J. R., 308.

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1912.

June, 13.

CHAMIER, J.

RAM LAL AND OTHERS,

versus

BACHCHA SINGH AND ANOTHER.*

Registration Act (XVI of 1908), section 50—Priority—Unregistered prior mortgage—Purchase at auction sale—Sale by the purchaser by means of a registered instrument—Resale by the vendee to the vendor by a registered instrument.

R made an unregistered mortgage by way of conditional sale without possession in favour of *B* in 1896. *G* purchased the mortgaged property in execution of a simple money decree in 1905. In 1910 *G* sold the property to the appellants by means of a registered deed, and the appellants in their turn sold a portion of it back to *G* by a registered deed. *R* brought a suit for foreclosure upon his mortgage: *Held*, that the appellants were entitled to rank in priority over the unregistered mortgage in favour of *R*, inasmuch as they had no notice of it; *held* also that in respect of the resale to him, *G* was entitled to priority over *R*, because he had no notice of the mortgage; and he was bound by it as auction-purchaser as there was no conflict between the mortgage and his purchase, and he was not protected by section 50 of the Registration Act.

Makandas Kalidas v. Shankardas, 12 Bom., H. C. R., 241, referred to.

SECOND APPEAL from a decree of G. A. Paterson, Esq., District Judge of Benares, reversing a decree of Babu Lakhpat Rai, Additional Munsif.

Suit for foreclosure.

The facts appear from the judgment.

Harendro Krishna Mukerji, for the appellants.

Satish Chandra Banerji and *Surendra Nath Sen*, for the respondents.

The following judgment was delivered by

Chamier, J.

CHAMIER, J.—This was a suit for foreclosure upon an unregistered mortgage made by the respondent, Ram Prasad, in favour of the respondent, Bachcha Singh, in March, 1896. The mortgage was without possession. The mortgaged property was brought to sale in 1905, in execution of a simple money decree passed against the mortgagor, and was purchas-

* S. A. No. 1148 of 1911.

ed by the appellant, Ganga Dyal, who entered into possession. In July, 1910, Ganga Dyal sold the property to the appellants, Ram Lal and Bindra. In September, 1910, Ram Lal and Bindra resold half of the property to Ganga Dyal. The appellants resisted the suit on the ground that they were purchasers for value without notice of the unregistered mortgage, and therefore the registered deed in their favour must take effect against the unregistered deed. The Munsif upheld this defence and dismissed the suit; but his decision was reversed by the District Judge.

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 Chamier, J.

According to the decisions in *Sobhag Chand v. Bhai Chand* ⁽¹⁾ and *Ramaraja v. Arunachala* ⁽²⁾, which have been approved in several later cases, the property was bound by the unregistered mortgage in the hands of Ganga Dyal as auction-purchaser whether he had notice of the mortgage or not, because he acquired by his purchase only the right, title and interest of the mortgagor. The District Judge has held that Ram Lal and Bindra also are bound by the mortgage because Ganga Dyal could not place his transferees in a better position than he was himself, and that it followed that Ganga Dyal under his purchase from Ram Lal and Bindra was in the same position. Here the learned Judge has, I think, fallen into an error. The unregistered mortgage was binding upon Ganga Dyal as auction purchaser because there was no conflict between his purchase and the mortgage, and section 50 of the Registration Act, 1877, did not affect the case. But there is a direct conflict between the registered sale-deed in favour of Ram Lal and Bindra and the unregistered mortgage deed in favour of the appellant, and according to section 50 of the Registration Act the registered sale-deed must prevail. It was held as long ago as 1875, that in order to attract the provisions of section 50 of the Registration Act of 1866 (which, as far as the present case is concerned, is in the same terms as section 50 of the Act of 1877), it is not necessary that the executant of the two conflicting deeds shall be the same person: see *Makanaas Kalidas v. Shankardas Haribhai* ⁽³⁾, the facts of which were very like those of the present case. As the High Court observed in that case:—"It

(1) [1882] I. L. R., 6 Bom., 193. (2) [1883] I. L. R., 7 Mad., 248.

(3) [1875] 12 Bom. H. C. R., 241.

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cannot be denied that *bonâ fide* purchasers from the original owner's heirs and assignee require protection against secret or concealed conveyances and charges no less than purchasers from the original owner himself and that, therefore, their case is as much within the mischief that the Act was intended to remedy."

It has no doubt been held that section 50 of the Registration Act does not operate to give priority to a person who takes with notice of a prior unregistered deed, but it has never been suggested that the appellants had notice of the unregistered deed in favour of Bachcha Singh. It was for the latter to plead and prove that the appellants had notice; but they never attempted to do so.

I have no hesitation in holding that the appellants, Ram Lal and Bindra, are not bound by the mortgage in favour of Bachcha Singh.

It was suggested that the appellant, Ganga Dyal, was not in the same position as Ram Lal and Bindra, because, as auction purchaser, he was bound by the mortgage, and he could not better his position by selling to Ram Lal and Bindra and buying back from them again. This contention might have had some weight if it had been on the ground of notice that Ganga Dyal was bound by the unregistered mortgage when he held the property as auction-purchaser; but he was bound by the unregistered mortgage only because there was no conflict between the mortgage and his purchase, and he was not protected by section 50 of the Registration Act. Now he holds under a registered sale-deed and is protected by that section. It is unnecessary to consider what his position would have been if either he or his transferors had had notice of the mortgage. As matters stand, he appears to me to be in the same position as the appellants, Ram Lal and Bindra, who are not shown to have had notice of the mortgage and are not bound by it.

In my opinion, the decision of the Munsif was correct and should not have been disturbed. I allow this appeal, set aside the decree of the District Judge, and restore the decree of the Munsif with costs here and in the lower appellate court.

Appeal allowed.

KUBER NATH AND OTHERS

versus

MAHALI RAM AND ANOTHER.*

*Contract Act (IX of 1872), sections 23, 27—Agreement to share profits—
Whether restraint of trade.*

CIVIL.

1912.

May, 31.

KARAMAT
HUSAIN, J.
TUDBALL, J.

An agreement, where certain persons fixed the rates to be charged for ginning and baling cotton, thus forming a combination, and further agreeing that they would share the profits in a certain way, was held to be neither in restraint of trade nor opposed to public policy.

Haribhai v Sharaf Ali, 1. L. R., 22 Bom., 861, and *Fraser & Co.*, v. *The Bombay Ice Manufacturing Co*, 1. L. R., 29 Bom., 107, referred to.

SECOND APPEAL from a decree of H. M. Smith. Esq., Additional Judge of Aligarh, modifying a decree of Babu Shikher Nath Banerji, Additional Subordinate Judge.

Suit for profits on the basis of an agreement.

The facts appear sufficiently from the judgment.

Sundar Lal, for the appellants.

B. E. O'Connor and *Tej Bahadur Sapru*, for the respondents.

The judgment of the Court was delivered by

TUDBALL, J.—The Managers of the five ginning firms came to an agreement, whereby they fixed the rates to be charged for ginning and baling cotton, thus forming a combination, and agreed that for a certain definite period the profits of ginning would be 7 annas 6 pies and of baling one anna 6 pies per maund. They further agreed that the profits were to be divided, and that those for baling were to be divided equally, while those for ginning were to be divided in proportion to the ginning capacity of the various factories. A dispute as to the ginning capacity of the factories arose and the suit was instituted by the plaintiffs for their share of the profits according to the ginning capacity of their mills. The court of first instance decreed the claim. On appeal, the decree was slightly modified by the lower appel-

Tudball, J.

* S. A. No. 840 of 1911.

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v.
Mahali Ram.
Tudball, J.

late court as to the amount to which the plaintiffs were entitled. In second appeal to this Court the only point pressed before us is that the agreement relied on was contrary to public policy and void in law. There are two cases decided by the Bombay High Court—*Haribhai Maneklal v. Sharaf Ali Isabji* (1) and *Frazer & Co., v. The Bombay Ice Manufacturing Company* (2), which show that such a contract is neither in restraint of trade nor opposed to public policy. We agree with these rulings. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(1) [1897] I. L. R., 22 Bom, 861.

(2) [1904] I. L. R., 29 Bom, 107.

CIVIL.

1912.

June, 14.

CHAMIER, J.

FAKIR CHAND

versus

KEWAL RAM AND ANOTHER.*

Landlord and tenant—Stranger building upon land of another—Purchase from a person having no title—Lapse to the zemindar—Whether such person entitled to remove materials of building.

A tenant owning a house in the village died without heirs and the house lapsed to the *zemindar*. The defendants purchased it from certain persons who had no title, and then improved it at considerable expense using the old materials, where possible. In a suit by the *zemindars* to eject the defendants, *held* that the defendants were not entitled to remove even the materials of the building.

Narayan v. Bholagir, 6 Bom. H. C. R., 80, and

Premji v. Haji Cassum, I. L. R., 20 Bom., 298, distinguished.

SECOND APPEAL from a decree of C. E. Guiterman, Esq., Additional Judge of Meerut, confirming a decree of Babu Brij Behari Lal, Munsif of Kairana.

Suit for possession of site.

The courts below decreed the suit.

Defendant appealed.

Durga Charan Banerji, for the appellant.

Satish Chandra Banerji, for the respondents.

* S. A. No. 38 of 1912.

The following judgment was delivered by

CHAMIER, J.—The facts found are that Manga, who was owner of a house in a village, died leaving a widow who held possession for some years. On the death of the widow the plaintiffs became entitled to the house as zamindars of the village, Manga having left no heirs besides his widow. The defendant-appellant took a sale-deed of the house, including the site from two persons who admittedly had no title. Having got into possession, he pulled down the old house and built a new one in its place. The courts below have given the plaintiffs a decree for possession of the land and house. The only question for decision in this appeal is whether the defendant-appellant should be allowed to remove the materials of the house.

Neither in his written statement nor in his grounds of appeal to the lower appellate court did the defendant-appellant claim to be entitled to remove the materials of the house, but the point seems to have been taken at the hearing in the lower appellate court.

The case is, of course, clearly distinguishable from cases in which a person buys a house in a village from a man who has no power to transfer it, but who is the owner of the materials. In such cases a decree for possession is given against the transferee, but he is given an opportunity of removing the materials. Nor, on the facts found, is the case covered by section 51 of the Transfer of Property Act.

According to the English law, the defendant in such a case as this, would not be entitled to remove the materials or claim compensation therefor. There is a long course of decisions in India according to which a person who builds on land which he knows to belong to another, may be allowed to remove the materials before a decree for his ejectment is carried out [see, for instance, *Narayan v. Bholagir* ⁽¹⁾, and *Premji v. Haji Cassum* ⁽²⁾], but those were cases in which the defendant had built upon land upon which there was no building at the time. In the present case there were buildings on the land which belonged to the plaintiff at the time

(1) [1869] 6 Bom. H. C. R., A. C. J., 80.

(2) [1895] I. L. R., 20 Bom., 298.

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when the defendant-appellant took possession. The defendant-appellant has not proved that he got rid of all the old materials and built a new house with entirely new materials. All that is shown is that he built a new house using presumably any of the materials of the old house which were serviceable. He spent, no doubt, a considerable sum on new materials and labour, but in the circumstances the buildings now on the land must be regarded as the old buildings with improvements and additions. The old and the new materials cannot be separated. I must decline to extend the decisions referred to above to cases in which a person spends money on improving buildings which he knows to belong to another person. The appeal is dismissed with costs.

Appeal dismissed.

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BALDEO RAI AND OTHERS

versus.

MURLI RAI.*

Mortgage—Foreclosure—Bond containing stipulation to pay later advance at time of redemption of earlier mortgage—No property made security in the later bond for further advance.

The ancestor of the defendants executed two bonds, dated respectively July 19, 1864, and September 1, 1865, in favour of the ancestors to the plaintiffs. The former was a mortgage by way of conditional sale. The later bond contained a promise to pay a definite sum with interest by the last day of *Bhisakh*, and provided that in the event of default the obligees might recover the money from the obligors personally and their movable and immovable property (none being specified). After making reference to the earlier deed the obligor said: "When we offer to pay the amount on the deed of conditional sale, we will first pay the amount with interest of the present deed of conditional sale. therefore we have written this bond (*tamassuk*) in order that it may be of use." In a suit for foreclosure in the event of non-payment of the amounts due under the two deeds: *held*, that the later bond did not create a mortgage.

SECOND APPEAL from a decree of Pandit Sri Lal, District Judge of Ghazipur, modifying a decree of Munshi Chhajju Mal, Subordinate Judge,

* S. A. No. 555 of 1912.

Suit for foreclosure. The facts and arguments appear from the judgment.

Govind Prasad, for the appellants.

M. L. Agarwala, for the respondent.

The following judgment was delivered by

CHAMIER, J.—This was a suit by the appellants for the recovery of Rs. 1,794, and in default of payment for foreclosure on the basis of two deeds, dated July 19th, 1864, and September 1st, 1865. Both deeds were executed by the ancestors of the respondents in favour of the ancestors of the appellants. The Subordinate Judge decreed the claim after making a slight correction in the appellant's account of interest. On appeal, the District Judge disallowed the claim so far as it rested on the later deed, which, in his opinion, was not a mortgage.

The only question for decision in this second appeal is whether the later deed is a mortgage.

The earlier deed is a mortgage by way of conditional sale in one of the usual forms, the date fixed for payment being June 24th, 1869.

The later deed contains a promise to pay a definite sum with interest thereon by the last day of *Baisakh* (presumably the next following *Baisakh*, which ended on April 29th, 1866), and provides that, if payment is not made, the obligees may recover the money from the obligors personally and from their movable and immovable property (none being specified). Then there is a reference to the earlier deed, and the obligors say:—
“When we offer to pay the amount due on the deed of conditional sale, we will first pay the amount with interest of the present deed and then pay the amount of the deed of conditional sale.....therefore we have written this bond in order that it may be of use (*is waste yih tamassuk likhdiya ke waqt per kam awe*)”. It was at one time supposed that such a stipulation was invalid as tending to hamper the mortgagor in the exercise of his right of redemption, but that notion is now exploded, and there is no doubt that such a stipulation is valid and can be enforced, but this suit was brought nearly forty-five years after the date of the second deed, and any

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claim to recover money on it is barred by limitation unless it is a mortgage.

The appellants have treated the sum payable under the later deed as a further advance on the security of the mortgage by way of conditional sale. They rely upon the decision in *Ranjit Khan v. Ramdhan Singh* ⁽¹⁾ and *Musammat Pancho v. Deokaran* ⁽²⁾. In the later deeds under consideration in those cases the promise was to pay the further advance along with the sum secured by the first deed, the later deeds were described as *tamassuk mashrat-ul-rehan*, and it was found on a consideration of all the terms of the deeds that the further advances were made on the security of the property already mortgaged. The later deed in the present case contains a personal covenant to pay the money more than three years before the earlier deed could have been enforced, the deed is described as a *tamassuk* only, the word usually employed to describe a money bond, and it is stamped as a money bond not as a mortgage. The obligees have under it a right to proceed against the obligors personally and against their property of every kind. In all these respects the later deed now in question differs from the deeds which were considered in the two cases cited. It is plainly impossible to treat the later deed as a deed of further mortgage or charge in the ordinary sense, for the terms and conditions of the later deed differ widely from those of the earlier deed.

But it is contended that a bond containing an agreement that the obligor shall not redeem a mortgage already made by him until he pays the amount of the bond is in itself and necessarily a second mortgage of the property. The judgments of RICHARDS and ALSTON, JJ., in *Ranjit Khan v. Ramdhan* ⁽³⁾ were relied upon as authority for this proposition. But the deeds under consideration in that case were, as I have shown, different in many respects from the deed now in question. RICHARDS, J., did not decide whether the deeds created mortgages or charges, and ALSTON, J., held that they were charges. Both learned Judges recognized the possibility of a deed of this kind not creating either a

(1) [1909] I. L. R., 31 All., 482

(2) S. A. No. 141 of 1909, unreported.

(3) [1909] I. L. R., 31 All., 482.

mortgage or a charge, indeed, they distinguished some previous cases from the case before them on the ground that, in those cases, the later deed was found to evidence neither a mortgage nor a charge, but to be a simple money bond containing a stipulation that a certain mortgage should not be redeemed except in a certain event.

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2. In order to constitute a mortgage there must be a transfer of an interest in specific immovable property. In the case of *Ranjit Khan v. Ramdhan*⁽¹⁾, it seems to have been suggested that the interest transferred was the right to remain in possession of the property. This view was not definitely accepted by the court, nor in my opinion should it have been accepted. At the date of the later deeds in that case and at the date of the later deed in the present case the obligors were out of possession. They had parted with their right to possession under the first deed. There was no transfer of the right to possession under the later deed, but only an undertaking not to retake possession except in a certain event. It may be urged that such an undertaking is commonly found in second mortgages of property already mortgaged with possession to the person who makes the further advance. That is perfectly true, but in the case of a second mortgage it is generally provided that the further advance is to be added to the original mortgage money, and all the conditions of the first deed are to apply to the further advance. The question in each case is whether the later deed shows that the property already mortgaged shall be held as security for the further advance. The later deed in the present case does not apply the conditions of the first deed to the further advance; on the contrary, it contains provisions inconsistent with the terms of the first deed. The rights of both parties under the later deed are entirely different from their rights under the earlier deed.

In my opinion, the later deed does not amount to a mortgage. It does not effect a transfer of an interest in any property and it does not add the further advance to the original mortgage money or make the conditions of the earlier deed applicable to the further advance. It may

(1) [1909] I. L. R., 31 All, 482.

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amount to a charge, but it is not enough for the appellants to make out that the later deed created a charge for a suit to recover money on the basis of a charge was barred many years ago under article 132 of the second schedule to the Limitation Act of 1877. Whatever may be done in a suit for redemption, the court cannot, in a suit of this kind, pass a decree for the payment of money the recovery of which is barred by limitation, and then go on to provide for foreclosure if the money is not paid.

In my opinion, the decision of the lower appellate court in this case is correct. I, therefore, dismiss this appeal with costs.

Appeal dismissed.

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RAHMATULLAH BEG

versus

YUSUF ALI AND OTHERS. *

Transfer of Property Act (IV of 1882). sections 63, 72—Mortgage—Redemption—Constructions made by the mortgagee—Right to add expenses incurred thereon to amount secured by mortgage—Interest.

Where a mortgagee in possession has expended money upon making additions to the mortgaged premises, he would be entitled, in a suit for redemption, to be repaid the expenses so incurred if the additions made are 'accessions' within the meaning of section 63 of the Transfer of Property Act, or are necessary for the preservation of the property or are lasting improvements reasonably made for the benefit of the property which added to the selling value.

Sandon v Hooper, 6 Beav., 246 ; S. C. 49 C. R., 820 ;

Shepard v. Jones, 21 Ch. D., 469, followed.

Held also, that a mortgagee is entitled, in the absence of any contract to the contrary, interest on the amount spent by him on repairs for the preservation of the mortgaged premises and also on the rates and cesses paid by him therefor.

SECOND APPEAL from a decree of G. A. Paterson, Esq., District Judge of Benares, modifying a decree of Babu Kesri Narain Chand, Additional Munsif.

* S. A. No. 823 of 1911.

Suit for redemption.

The facts and arguments are set out in the judgment.

Haribans Sahai, for the appellant.

Muhammad Ishaq, for the respondents.

The following judgment was delivered by

BANERJI, J.—This appeal arises out of a suit for redemption of a mortgage made on the 7th of July, 1891, by one Musammat Munga Bibi, now represented by the plaintiff and some of the defendants. The principal amount secured by the mortgage was Rs. 35. The plaintiff offers to pay that amount, but claims Rs. 30 as damages for injury done to the mortgaged premises, which was a house. The mortgagee claimed in addition to the principal amount of the mortgage certain sums alleged to have been spent on repairs of the house and in rebuilding portions of it which had fallen down, and also water rates paid by him together with interest. The plaintiffs denied that any constructions had been made and that the mortgagor had assented to such constructions.

The court of first instance awarded to the mortgagee costs of repairs, together with interest, the amount of rates and cesses paid, as also interest thereon; and costs of constructions, which it found had been made with the consent of the mortgagor.

The lower appellate court agreed with the court of first instance as to the amount of costs incurred in repairing the houses and also as to the amount of rates and cesses paid, but disallowed interest on these amounts. As to the costs of additions made to the house, the learned Judge did not consider the question whether any such additions had been made or whether they were reasonable and necessary, but he was of opinion that it had not been proved that the constructions had been made with the assent of the mortgagor, and on this ground alone disallowed the claim of the mortgagee for the costs of constructions and improvements.

The mortgagee has preferred this appeal.

As to the costs of repairs the lower appellate court has, as I have mentioned above, found in concurrence with the first

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court that the amount of such costs was Rs. 145. The learned Judge, however, is of opinion that the defendant mortgagee is not entitled to interest on the costs inasmuch as although the mortgage deed provides for payment of costs of repairs it contains no provision for payment of interest, and this according to the learned Judge, is "a contract to the contrary" within the meaning of section 72 of the Transfer of Property Act. That section provides that the mortgagee may spend such money as is necessary for, among other things, the preservation of the mortgaged property from destruction, forfeiture or sale, and may, in the absence of a contract to the contrary, add such money to the principal money at the rate of interest payable on the principal,—and where no such rate is fixed, at the rate of 9 per cent. per annum. In the present case, there was no rate of interest fixed in the mortgage deed. Therefore, the mortgagee was entitled to interest on the amount spent for repairs effected with the object of preserving the property in pursuance of the terms of the mortgage, at the rate of 9 per cent. per annum. I do not agree with the learned Judge that the mere circumstance that in the mortgage deed it was not specifically mentioned that interest would be paid on costs of repairs is a contract to the contrary in respect of interest. Apart from the provisions of the mortgage deed, the mortgagee is entitled to costs of repairs as being costs necessarily incurred for the preservation of the property, and on such costs, unless it is provided that interest would not be paid, interest is chargeable under the provisions of section 72 at 9 per cent. per annum. On this point the court below is, in my opinion, clearly wrong, and it ought to have allowed interest on the Rs. 145, at the rate of Rs. 9 per cent. per annum.

Next as to rates and cesses, the learned Judge has allowed the principal amount paid, namely, Rs. 8-11-3. He has disallowed interest on the ground that the defendant mortgagee had not claimed interest. The learned Judge, apparently, overlooked the first paragraph of the statement in which the defendant distinctly stated that he was legally entitled to receive the costs of repairs and construction, as well as the amount paid as water rate "together with interest." The defendant ought, therefore, to have been allowed interest on

the amount of the rates and cesses, and this should be allowed now.

There remains the question of the costs of constructions. I have already stated that it was denied by the plaintiff that any constructions had been made, and it was also denied that the constructions were made with the mortgagor's permission. The learned Judge has not gone into any point except the question of assent. The court of first instance which had the witnesses before it, and which was in a better position than the learned Judge to judge of their credibility, came to the conclusion that the statements of the witnesses on the point were true and believed them. The probabilities were also in favour of the constructions having been made with the mortgagee's consent. It was most unlikely that the mortgagee would have spent any large sum in making additions and improvements unless he had obtained the consent of the mortgagor to his doing so. However, this Court as a Court of second appeal, must accept the finding of fact of the lower appellate court, and it must be taken upon that finding that the constructions were made without the express or implied permission of the mortgagor. In the written statement it was stated that the mortgagee had spent Rs. 280-6-6 on repairs to the house and on building portions thereof which had fallen down. If the mortgagee made the constructions in question in order to rebuild portions which had fallen down, they would come within section 72 (b), being constructions necessary for the preservation of the property from destruction. The court of first instance was of opinion that the house was in a delapidated condition, that the Municipal Board had issued orders to the defendant to reconstruct the house, and that by the constructions made the house was made habitable. If this was a correct finding, the case would clearly come, as I have said above, within the provisions of section 72, clause (b). But if, as the other side urges, there were additions made to the house, two questions would arise; first, whether the additions were necessary for the preservation of the mortgaged premises, and secondly, whether they were lasting improvements, reasonably made for the beneficial enjoyment of the mortgaged premises. As observed by LORD LANGDALE in the leading case of *Sandon*

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v. *Hooper* (1), a mortgagor could not be improved out of his estate, that is to say, the mortgagee has no right to spend money in increasing the value of the property in such a way as to prevent the mortgagor from redeeming. The law on the subject is thus summarised in *Fisher on Mortgages*, VI edition, p. 897 :—"The improvements must always be reasonable, having regard to the nature and value of the estate, for if it were not so, a weapon would be put in the mortgagee's hands with which he might greatly clog the right of redemption, which he has no right to make more expensive than is necessary to keep the estate in good repair and working order and to protect the title." Further on, he says, the mortgagee will not "lose his right to repayment for improvements made for want of giving notice, if the improvement was reasonable and beneficial." To the same effect is a passage in *Coote on Mortgages*, page 1224. The case of *Sandon v. Hooper* was considered by the Court of Appeal in the later case of *Shepard v. Jones* (2). In that case, JESSEL, M. R., held that where the mortgagee can prove that the selling price was increased by reason of the outlay then to the extent to which the selling price has been so increased, the mortgagor cannot get the benefit of it without paying for the outlay. He adds that notice of the improvement is not necessary if it is a reasonable one and produces a benefit. In the same case, BRETT, L. J., observed that if the mortgagee gave *prima facie* evidence that the improvement would be a lasting improvement and that the expenditure incurred by him on the improvement was a reasonable expenditure, the mortgagee would be entitled to an enquiry, and no question of notice will arise. COTTON, L. J., made the following remarks :—"In a case of this sort where there has been no alteration in the nature of the property, which a mortgagee must not make but merely an expenditure *prima facie* increasing the saleable value of the estate for the purpose for which it was intended, it is, in my opinion, if it can be shown that there has been an increase in the sale value of the estate, an expenditure which the mortgagee is entitled to have repaid to him as a reasonable expenditure." The additions might

(1) [1843] 6 Beav., 246 ; S. C. 49 C. R., 820.

(2) [1882] 21 Ch. D., 469.

come under the head of accessions within the meaning of section 63 of the Transfer of Property Act. But whether they were accessions or whether they were necessary for the preservation of the property, or whether they were lasting improvements reasonably made for the benefit of the property which added to the selling value of it, in all these cases, the mortgagee would be entitled to the value of the additions. A similar view appears to have been held in this Court in *Durga Singh v. Naurang Singh* ⁽¹⁾. The Madras High Court, no doubt, held in *Arunachella Chetti v. Mithaya Ammal* ⁽²⁾, that the mortgagee is not at liberty to effect improvements and charge the mortgagor therewith, notwithstanding the consent of the mortgagor. In view of the authorities to which I have referred, I am unable to agree with the ruling, and as pointed out by Dr. Ghose in his work on Mortgages, page 549, the learned Judges laid down the law somewhat broadly.

For the above reasons, it is necessary to obtain from the court below findings on the following issues, which I refer to that court under the provisions of Order 41, Rule 25 of the Code of Civil Procedure :—

- (1) Were any constructions and additions made by the mortgagee in the mortgaged premises ; and, if so, what, and at what cost ?
- (2) Were those constructions necessary for the preservation of the mortgaged property from destruction ?
- (3) Were the additions, if any, lasting improvements reasonably made, having regard to the nature and value of the property, and were they beneficial thereto ?

The court will take such additional evidence as the parties may adduce. On receipt of its findings the usual ten days will be allowed for filing objections.

Issues remitted.

(1) [1895] I. L. R., 17 All., 282.

(2) [1886] I. L. R., 19 Mad., 327.

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NAND RAM

versus

BHOPAL SINGH.*

*Civil Procedure Code (Act V of 1908), section 115—Scope of section—
Interlocutory order—Revision.*

An application under section 115 of the Code of Civil Procedure cannot be entertained in the case of those interlocutory orders against which, though no immediate appeal lies, a remedy is supplied by section 105, which provides that they may be made a ground of objection in appeal against the final decree.

There were no words in section 622 of the Code of Civil Procedure, 1882, nor are there any in section 105 of the present Code (1908), limiting the right of attack to such orders only as are "affecting the decision of the case" *with reference* to its merits, and in the absence of any such limitation a court has no power to read such a limitation into the section.

CIVIL REVISION from an order of Babu Ram Chandra Saksena, Munsif of Sambhal.

The facts of the case appear sufficiently from the judgment of the Court.

A. E. Ryves, for the applicant.

A. H. C. Hamilton and *Benode Behari*, for the opposite party.

The following judgments were delivered :—

*Karamat
Husain, J.*

KARAMAT HUSAIN, J.—The plaintiff, in 1910, sued on a mortgage made by two joint brothers, Bhopal and Bahadur. Bhopal, his son Baddari, grandson Harnarain Singh, and nephew Sham Lal, were defendants. Baddari was appointed guardian *ad litem* of his minor son Harnarain, and notice was served upon him on the 14th of August, 1910. Bhopal signed it as a witness. Notice was not served on Bhopal personally, but the summons was affixed on the door of his house. The record does not show if this was deemed by the Munsif to be sufficient service. The suit was decreed on the 19th of December, 1910. The decree against Bhopal was *ex parte*. An application for an order absolute was made on the 16th of July, 1911, and granted.

* Civ. Rev. No. 34 of 1912.

Bhopal, on the 1st of August, 1911, applied under Order 9, Rule 13, to have the *ex parte* decree set aside, stating in the affidavit that on the date on which the case was heard, he was in Allahabad. The Munsif, holding that there was sufficient reason for absence, set aside the *ex parte* decree on the 18th of December, 1911, and made another decree at variance with the *ex parte* decree on the 13th of February, 1912.

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The decree-holder, on the 19th of February, 1912, came to this Court in revision against the order, dated the 18th of December, 1911, but never appealed against the decree, dated the 13th of February, 1912.

In support of the application it is argued that under Order 9, Rule 13, corresponding to section 108, Code of Civil Procedure of 1882, a court has power to set aside an *ex parte* decree "only when he (the applicant) satisfied the court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the case was called on for hearing", and as no cause is alleged for absence and, as there is nothing on the record to show that summons was not duly served, the Munsif had no jurisdiction to set aside the *ex parte* decree. The reply of the learned counsel for the other side is that the remedy open to the applicant was to attack the order in appeal from the decree, dated the 13th of February, 1912, and as he allowed it to become final, he could not be heard in revision. He also urges that the result of interference would be to set aside a final decree. The contention that the Munsif acted without jurisdiction is not an accurate statement of what took place. He wrongly considered what was no cause to be a sufficient cause for absence, but did not act without jurisdiction. The order can, therefore, not be a fit subject for revision. Assuming that he acted with material irregularity, though not without jurisdiction, the remedy of the applicant was to attack the order in appeal from the decree of the 13th of February, 1912, under section 105, Code of Civil Procedure, and as he failed to appeal, he cannot be allowed to come up in revision. In *Farid Ahmed v. Dulari Bibi* (1), it was held that an order made under section

(1) [1889] I. L. R., 6 All., 233.

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25, Code of Civil Procedure, transferring a suit in which an appeal would lie from the decree made therein was not subject to revision by the High Court under section 622. In *Sheo Prasad Singh v. Kastura Kunwar* ⁽¹⁾, it was remarked that the revisional powers of this Court should not be exercised unless as a last resort for an aggrieved litigant. Even when there is a remedy by a fresh suit, there can be no revision. See *J. J. Guise v. Jaisraj* ⁽²⁾. Regarding this case, KNOX, J., in *Debi Das v. Ejaz Husain* ⁽³⁾ said :—"Ordinarily I am prepared to subscribe to that, but in this matter each case must be judged upon the circumstances peculiar to it."

I adopt the following remarks in *Moti Lal Kashibhai v. Nana* ⁽⁴⁾, substituting section 115 for section 622 and section 105 for section 591. "An application under section 622 cannot be entertained in the case of those interlocutory orders against which, though no immediate appeal lies, a remedy is supplied by section 591, which provides that they may be made a ground of objection in the appeal against final decree. The purpose with which section 622 was passed was to enable a party to a suit to get rid of a decision or order of a lower court rectified by the High Court where there would otherwise be no remedy."

There is, however, a conflict of opinion whether an order setting aside an *ex parte* decree is or is not attackable in appeal from a final decree. A Bench of the Calcutta High Court held that it is not, and that only such orders are within the purview of the section as are "affecting the decision of the case" *with reference to its merits* (*Chintamani Dassi v. Raghunath Sahu* ⁽⁵⁾) and *Musammat Oagnee Chaudarane v. Shaikh Karamatullah* ⁽⁶⁾. According to that court the order can be reversed under section 622, Code of Civil Procedure of 1882=section 115, Code of Civil Procedure of 1908—if the requirements of the section are satisfied, *Muhammad Hamid-ul-lah v. Toberr-un-nissa Bibi* ⁽⁷⁾. A Bench of

(1) [1889] I. L. R., 10 All., 119. (2) [1893] I. L. R., 15 All., 405.

(3) [1905] I. L. R., 28 All., 72. (4) [1892] I. L. R., 18 Bom., 35.

(5) [1895] I. L. R., 22 Cal., 981. (6) [1904-5] 9 C. W. N., 584.

(7) [1897] I. L. R., 25 Cal., 155

the Madras High Court in *Gopala Chetti v. Subbeer* ⁽¹⁾, has taken the opposite view, holding that an order setting aside an *ex parte* decree could be attacked in appeal from the final decree. With due respect to the learned Judges who decided the cases reported in I. L. R., 22 Cal., 981 and 9 C. W. N., 584, I agree with the learned Judges who decided the case I. L. R., 26 Mad., 604. There were no words in section 622, Code of Civil Procedure of 1882, nor are there any in section 115, Code of Civil Procedure of 1908, limiting the right of attack to such orders only as are "affecting the decision of the case" *with reference to its merits*, and in the absence of any such limitation a court has no power to read such a limitation into the section.

The contention that in order to destroy the right to apply for revision, some other remedy must exist on the date on which the order sought to be revised is made has no force. All interlocutory orders, which can be attacked in appeals from final decrees under section 105 are, always, passed before the final decree, and if the contention was right, all orders which might be attacked in appeal from the final decree, would furnish grounds for applications in revision, and the object for which the section is enacted would be defeated.

For the above reasons I would reject the application.

KNOX, J.— I agree in rejecting the application. Sufficient ground has not been shown for interference.

BY THE COURT.—The application is rejected with costs.

Application rejected.

(1) [1903] I. L. R., 26 Mad., 604.

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RAM CHARAN LAL AND ANOTHER

versus

MUHAMMAD RASHID-UD-DIN AND OTHERS.*

Civil Procedure Code (Act V of 1908), Order I, Rule 9, Order XXXIV, Rule 1—Puisne mortgagee—Non-joinder of parties—Prior mortgage merging into a decree no bar to suit by puisne incumbrancer.

On principle it is always desirable that all the necessary parties in a mortgage suit should be before the court, so that all the rights and interests in the property may be settled once for all, and it is, therefore, the duty of the court to implead necessary parties.

A suit, however, will not fail by reason of non-joinder of parties and the provisions of Order XXXIV, Rule 1 of the Code of Civil Procedure, are subject to the provisions of the Code which includes Order I, Rule 9.

The mere fact that a prior mortgage is merged into a decree cannot prevent a subsequent incumbrancer from suing to enforce his security inasmuch as the rights of the prior mortgagee are always protected in the decree which they obtain on their mortgage.

SECOND APPEAL from a decree of D. R. Lyle, Esq., District Judge of Shahjahanpur, confirming a decree of Saiyid Iftikhar Husain, Munsif of Badaun West.

Suit for sale on a mortgage.

The facts and arguments appear from the judgment of the Court.

Satish Chandra Banerji, for the appellants.

Ibn Ahmad, for the respondents.

The judgment of the Court was delivered by

Karamat
Husain, J.

KARAMAT HUSAIN, J.—This was a suit by the representatives in interest of a subsequent mortgagee for sale upon his mortgage, dated the 20th of August, 1895. The plaintiffs did not make the prior mortgagee, Mohi-ud-din Haider, a defendant to the suit, nor did they make Lachhmi Narain and others, son of Gopal, mortgagees subsequent to themselves defendants to the suit. The court of first instance gave a decree for sale of the property which was not covered by the prior or subsequent mortgage. In appeal to the

* S. A. No. 1036 of 1911.

lower appellate court two points were pressed, (1) that the plaintiffs were entitled to a decree for sale of the property covered by the prior mortgage; (2) that they were entitled to a decree for sale without impleading the subsequent mortgagee. In second appeal it is contended (1) that the mere fact that the prior mortgage is merged into a decree cannot prevent a subsequent mortgagee from enforcing his security, and (2) that a puisne mortgagee is not disentitled to a decree for sale if he has failed to implead a mortgagee subsequent to himself. The learned counsel for the respondents contends that as Lachhmi Narain and others, mortgagees, subsequent to the plaintiffs, were not made parties, the suit under the provisions of Order 34, Rule 1, must fail. We are not prepared to accept this contention inasmuch as Order 1, Rule 9, expressly provides that non-joinder of necessary parties is not fatal to a suit, and the provisions of Order 34, Rule 1, are subject to the provisions of the Code which includes Order 1, Rule 9. On principle, it is always desirable that all the necessary parties in a mortgage suit should be before the court, so that all the rights and interests in the property may be settled once for all, and it is, therefore, the duty of the court to implead necessary parties. As in the case before us, the court has not done so, the decrees of both the lower courts are, in our opinion, defective. We, therefore, set aside the decrees of both the courts below and send down the case to the first court through the lower appellate court with a direction to make Lachhmi Narain and others parties to the suit and decide the case according to law. On the first point taken before us in the appeal, we are of opinion that the mere fact that a prior mortgage is merged into a decree, cannot prevent a subsequent incumbrancer from suing to enforce his security inasmuch as the rights of the prior mortgagees are always protected in the decree which they obtain on their mortgage. Costs will abide the result.

Appeal allowed—Cause remanded.

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LACHHMI

VERSUS

SANGRAM AND ANOTHER.*

CIVIL,

1912.

March, 21.

RICHARDS, C. J.,
BANERJI, J*Custom—Inheritance—Exclusion of daughter—Hela Jats.*

As regards the succession of daughters among *Hela Jats* residing in the Muzaffarnagar district, the custom was alleged in the following terms: "Among all the members of the Jats the custom is that the daughters and their descendants do not in general get any share by right of inheritance out of the property left by the daughter's father." The *wajib-ul-arz* also recorded the custom in equally vague terms. The oral evidence disclosed that there were more instances of non-observance of the custom than of its observance. *Held*, that the custom was not proved.

FIRST APPEAL from a decree of C. E. Guiterman, Esq., Additional Judge of Meerut.

Suit for declaration of title.

The facts are set forth in the judgment of RICHARDS, C. J.

The court below decreed the suit.

Defendant appealed.

M. L. Agarwala, for the appellant.

J. N. Chaudri, for the respondents.

The following judgments were delivered:—

Richards, C. J.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiffs claimed a declaration that they are entitled to certain zamindari property. Mukhram, Sis Ram and Nichal, were three brothers, who, according to the finding of the court below, were separate. Nichal died leaving his son Mula. Mula died, and after his death his mother, Musammat Dharman, was recorded. After her death Sis Ram succeeded to the property and thus became the owner of two-thirds. Sis Ram died without a son, but according to the finding of the court below, (which upon this question, as also upon the question of the family being separate, is not challenged) Musammat Lachhmi was the legitimate daughter of Sis Ram. The plaintiffs allege that, according to custom, Musammat Lachhmi is excluded from all right to the property of Sis Ram. The custom is set forth in paragraph 8 of the plaint as follows: "The

* F. A. No. 64 of 1911.

parties are Jats. The ancestors of the parties and the other members of the Jat community had come from the Punjab. Among all the members of the Jats the custom is that the daughters and their descendants do not in general get any share by right of inheritance out of the property left by the daughter's father. Therefore, according to the custom obtaining among the members of the Jat community, the defendant has no right of inheritance."

It will be seen here that the custom is alleged in very vague terms. It is said that the daughters and their descendants do not *in general* get any share by right of inheritance. From the evidence which was given in the present case, it seems that the allegation of the custom as being "in general" (*bilamun*) was not a mere inadvertence, because there were many instances given in which the alleged custom was not observed amongst the members of this very community. It must further be remarked that if the custom exists, as set forth in the plaint, it is a very harsh and unnatural custom, because the daughter, except by way of charity, has not a right even to maintenance or to have her marriage expenses defrayed. The evidence given in the case consisted of the *wajib-ul-ars* of the two villages in which the property is situate, and the oral evidence of a number of witnesses who stated that the custom existed, and gave certain instances in which it was observed. It is possible to look upon the case from two aspects. First, as the allegation of a general custom amongst the whole of the Hela Jats, and, secondly, as the allegation of a custom which exists in a general way amongst the Hela Jats, but is an established custom prevailing among the community who reside in the villages in which the property is situate. Looking at the case from the latter point of view, first, I find that according to the evidence there are more instances of the non-observance of the alleged custom in these villages than there are instances in which the custom was observed. The *wajib-ul-ars* is, no doubt, entitled to be duly considered. The custom is there set forth almost as vaguely as it is set forth in the plaint. There is no mention of the incidents of the custom, such as the maintenance of daughters and the defraying of their marriage expenses. Under these circumstances, I think, that no court would be

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justified in holding that this particular custom has been proved by the evidence in the present case to be an established custom prevailing in the villages in which the property is situate. Looking at it from the other point of view, namely, as to whether or not the evidence establishes an universal custom amongst the Hela Jats, I think that the plaintiff's case even more signally fails, and that it would be quite impossible for any court to hold on the evidence that there is an universal custom amongst the Hela Jats. The court below took a view different from the view which we take, but it is to be borne in mind that the Judge was in no better position than we are in coming to a conclusion upon the evidence. The learned Judge who gave the judgment, was not the Judge who heard the witnesses. I have no hesitation in saying that in the present case the appeal should be allowed and the decree of the court below set aside.

Banerji, J.

BANERJI, J.—I am of the same opinion. The plaintiffs admittedly have accepted the position that in certain respects they are governed by the Hindu law. When they assert that one rule of Hindu law does not apply to them in consequence of the existence of a custom which prevails among the community to which the parties belong, it is incumbent on them clearly to state that custom and all its incidents and to establish it by unmistakable evidence. Not only have they to establish that the custom exists, but they have also to prove that it is ancient and invariable. The evidence in this case falls far short of establishing the existence of an ancient and invariable custom. If we confine ourselves to the villages in which the property in suit is situate and in which the parties reside, we have, according to the witnesses, only four instances of exclusion of daughters from inheritance to their father's estate. Those instances are the cases of Kewal, Ghisa, Bhup and Chumba. In the case of Ghisa there is a minor daughter who may put forward a claim to her father's estate. She is now living apparently on friendly terms with the persons who are in possession of Ghisa's estate. There is time enough for her to assert her right to that estate when she attains majority. The case of Ghisa, therefore, should be left out of consideration. We have thus only three instances in

these villages in which the daughter was excluded. But, on the other hand, we have five instances of the succession of daughters in these very villages. No sufficient explanation has been given by the witnesses who speak of the existence of a general custom as to the reason for the succession of the daughters in the five cases mentioned. As regards two of them it is said that there were no near relations who could claim the estate, but the custom, as alleged, totally excludes daughters. In one other village in the Muzaffarnagar district, namely, Shamli, mention is made of only one instance, namely, that of the estate left by Milki, which did not go to his daughter, but Milki appears from the evidence to have died only two years ago, so that this case cannot be regarded as one in which the daughter was totally excluded. It often happens that daughters are married into rich families and go to reside with their husbands and do not claim their father's estate. In the absence of sufficient evidence showing that in spite of a claim asserted by the daughters, they were excluded from inheritance by the male relations of the deceased, mere exclusion in certain instances would not be sufficient to establish a custom such as that alleged. The witnesses for the plaintiffs admit that in three other instances as to which there is no clear evidence, whether they are instances relating to the villages Bhikhi, Kundana and Kudana, the daughters did succeed to their father's estate. Therefore, if we confined ourselves to the villages in which the property in suit is situate, the alleged custom is not established by the oral evidence adduced. The *wajib-ul-ars*, no doubt, mentions that daughters are excluded, but as pointed out by the learned Chief Justice, the custom set forth in the *wajib-ul-ars*, is too vague to be accepted as a prevailing custom. The antiquity of the custom alleged by the plaintiffs is not proved, and as has been pointed out above, it has been proved that it is not invariable. In view of these facts it would now be proper to consider whether the custom prevails among Jats of the Hela tribe in other parts of the Province. If we were to consider the existence of such a custom among all Jats of the Hela community, the evidence is altogether insufficient to establish the alleged custom. The plaintiffs, therefore, failed to prove the case they set up, and their suit ought to have been

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dismissed instead of being decreed. I would allow the appeal.

BY THE COURT.—The order of the Court is that the appeal is allowed, the decree of the court below set aside and the plaintiffs' suit dismissed with costs in both courts.

Appeal allowed. •

BALMAKUND

versus

ASHFAQ HUSAIN.*

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May, 2.

KARAMAT
HUSAIN, J.
TUDBALL, J.

Ex parte order—Setting aside—Inherent power of the court.

Held, that a court has power by a subsequent order to set aside an *ex parte* order passed by itself and to correct any mistake it may have made therein.

SECOND APPEAL from the decree of Austin Kendall, Esq., District Judge of Cawnpore, reversing the decree of Babu Murari Lal, Officiating Subordinate Judge.

The facts were these :—Jagannath Prasad obtained a decree against Ashfaq Husain. He applied for its execution on 17th April, 1911. The judgment-debtor objected that the executing court had no jurisdiction as the decree had been transferred to another court on a previous application, and that the decree was barred by limitation. The date fixed for hearing these objections was 8th June, 1911. In the meantime, Jagannath had sold his decree to Balmakund on 27th April, 1911, who applied on 2nd June, 1911, for execution. Upon this application the court ordered notices to issue under Order 21, Rule 16, and fixed the 24th June, 1911, for hearing any objections. On the 8th June, 1911, the date fixed for hearing the objections to the application of 17th April, the decree-holder, Jagannath, did not appear; the objections of the judgment-debtor were heard and allowed, and the application for execution was dismissed.

• S. A. No. 47 of 1912.

When the application of Balmakund came up for hearing on the 24th June, the judgment-debtor objected that the matter had already been disposed of by the order of 8th June, and the decree could no longer be executed. The court overruled the objection and ordered execution to proceed. This order was reversed by the District Judge on appeal. •Decree-holder appealed.

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Tej Bahadur Sapru, (for the appellant):—The order of 8th June is not binding upon Balmakund as he was no party to the proceedings. The original decree-holder having assigned his decree ceased, at the date of that order, to have any interest in it. At that date the real decree-holder was Balmakund, and he had applied for execution before that date. In making the order of 8th June, the court overlooked this fact altogether. That order should not have been passed while the application of 2nd June was pending decision.

Abdul Raoof (with him *B. E. O'Connor*, and *Muhammad Ishaq Khan*), for the respondent:—The order of 8th June stands intact. It has not been set aside by appeal, review or revision. The executing court, which passed that order, could not set aside, alter or ignore it except by a formal review. The order of that court granting Balmakund's application for execution is, therefore, illegal. At the date of the order of 8th June, the only person whom the court could recognize as decree-holder, was Jaganath. The assignee, Balmakund, had no *locus standi* then, for upto that time the assignment had not been proved to, and recognized by the court. The assignment could not, *ipso facto*, wipe out the name of the original decree-holder at once; it could take effect only when recognized by the court in proper proceedings therefor. The order of 8th June was, therefore, passed against the right decree-holder, and is binding upon his assignee.

The assignee should have given notice of the assignment to the parties and obtained postponement.

I rely on the ruling in.

Sinnu Pandaram v. Santhoji Row, [1902] I. L. R., 26 Mad., 428.

Tej Bahadur Sapru, in reply :—Notice of the assignment could be given only through the court and on the assignee's

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application, dated 2nd June. Notices were ordered by the court to issue. The court by granting Balmakund's application for execution, must be deemed to have, in effect, set aside or corrected its *ex parte* order of 8th June.

The judgment of the Court was delivered by

KARAMAT HUSAIN, J.—In this case one Jagannath obtained a decree against Asfaq Husain from the court of the Subordinate Judge of Cawnpore. He made several applications for the transfer of that decree either to the court at Lucknow or that at Bareilly. The decree-holder, on the 18th of April, 1911, made an application for execution in the court of the Subordinate Judge of Cawnpore. The 18th of June was fixed for the hearing of objections raised by the judgment-debtor. Before that date the decree-holder assigned that decree to Balmakund on the 27th of April, 1911. Balmakund, on the 2nd of June, 1911, made an application under Order 21, Rule 16, for the execution of that decree. The Munsarim on that very date made the following report:—"This is an application under Order 21, Rules 11 and 16 of Act V of 1908, and an application in execution has been made on behalf of Jagannath Prasad, decree-holder, and the 8th of June, 1911, has been fixed for the disposal of the objections taken by the judgment-debtor. This application has been presented by the purchaser of the decree." The order on this report is that this be entered in the register of miscellaneous cases and notices fixing the 24th of June, 1911, be issued to the opposite party. The case be put up on the same date for disposal. On the 8th of June, 1911, the application setting out the objections raised by the judgment-debtor to the application of the original decree-holder, Jagannath, dated the 18th of April, 1911, was taken up. The decree-holder, Jagannath, was absent for the simple reason that he had parted with his interest in the decree in favour of the assignee, Balmakund, who had no notice of that date. The court, after hearing the objections raised by the judgment-debtor, allowed those objections and held the decree to be barred by limitation. On the 10th of November, 1911, when the court took up the application of the assignee, dated the 2nd of June, 1911, for disposal, objections were taken by the judgment-debtor,

One of those objections was that the application for execution of the decree by the decree-holder was rejected finally on the objection of the judgment-debtor on the 8th of June, 1911, and that, therefore, the decree could not now be executed. Regarding this objection the learned Subordinate Judge remarked as follows :—" I am of opinion that when the decree-holder had not appeared and his pleader did not proceed with the application, it simply should have been rejected. No trial and disposal of the objection was called for. Anyhow, the objections were decided against a person who had no longer any interest in the decree, having sold it before, and the decision was not binding upon the person who was the rightful owner and was not before the court. This disposes of the objection." An appeal was preferred to the learned District Judge, who allowed the appeal on the ground that the order of the Subordinate Judge, dated the 8th of June, 1911, was a subsisting order, and that all the steps taken subsequently thereto were *ultra vires*. The learned District Judge, in connection with that order, remarks :—"The proceedings of the lower court may be called careless or may be called inconsistent. But in my opinion they were perfectly legal, and the order of 8th June could not be ignored or set aside by the court itself in subsequent proceedings....."

On the facts it is clear that all subsequent proceedings were *ultra vires* and must be set aside." Facing this view of the order of 8th June, 1911, the learned District Judge allowed the appeal. A second appeal is preferred from the decree of the learned District Judge, and it is contended that the order of 8th June, 1911, regard being had to the circumstances of the case, is to be treated as, in substance, set aside by the learned Subordinate Judge. The learned counsel for the other side argues that that order has in no way been set aside, and that, therefore, it ought to stand. There can be no doubt that the learned Subordinate Judge, when he took up the case on the 8th of June, 1911, was in possession of the facts that the decree-holder had assigned the decree to Balmakund, that he had no subsisting interest in the decree, and that the assignee had no notice of the date fixed for the disposal of the objections taken by the judgment-debtor. The order which he passed was, therefore, quite illegal. That being

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so, we are of opinion that the learned Subordinate Judge, by his order, dated the 10th of November, 1911, rectified the mistake committed by his predecessor on the 8th of June, 1911, and his remark, in respect of that order must be treated as virtually setting aside that order which was an *ex parte* order, and we think that he had power to do so, inasmuch as it is open to every court to correct such mistakes. Such being the case, the view taken by the learned District Judge is not correct. The result is that we allow the appeal, set aside the order of the learned District Judge, and send back the case to him for the decision of the appeal on its merits. The appellant will be entitled to his costs of this appeal.

B. K. M.

Appeal allowed.

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May, 17.
KNOX, J.

DURGA DATT
versus
KING-EMPEROR.*

Criminal Procedure Code (Act V of 1898), Chs. XVIII, XXI; sections 208, 256, 439 - Procedure in cases triable by court of session—Revision—Practice—Precedents.

Ordinarily the High Court is most unwilling to interfere with interlocutory orders in revision, but it will do so where it is abundantly clear that the court below has not adopted the procedure prescribed by law but has followed a procedure of its own.

The practice of a Magistrate in inquiries into cases triable by a court of session not to allow any cross-examination before he frames a charge-sheet or till such time that the examination-in-chief of all witnesses for prosecution is over, is contrary to law and must be avoided. A Magistrate has no power to curtail the cross-examination of witnesses except as provided in the Code of Criminal Procedure or the Evidence Act.

The wording of section 208 of the Code of Criminal Procedure makes it clear that the intention of the Code was that as each witness was examined, he should be then and there cross-examined and re-examined

* Cr. Rév. N^o. 201 of 1912.

and allowed to go home. The Code has considerations for witnesses and their convenience, but this consideration is not always shared by Magistrates,

The procedure prescribed by Chapter 18 of the Criminal Procedure Code, compared with that prescribed by Chapter 21.

A Magistrate in the Province of Agra should follow the precedent of the Allahabad High Court

CRIMINAL REVISION from an order of H. Bomford, Esq., Joint Magistrate, First Class, of Cawnpore.

The facts of the case appear sufficiently from the judgment of the Court.

C. Dillon and *W. Wallach*, for the applicant.

Satya Chanda Mukerji and *Sital Prasad Ghosh*, for the opposite party.

The following judgment was delivered by

KNOX, J.—This is an application for the revision of an order passed by the Joint Magistrate of Cawnpore on April 1, 1912. The Magistrate was asked to cancel a charge sheet, which he had drawn up against the petitioner. He was also asked to take the evidence of witnesses, which the accused wished to produce before him. He declined to cancel the charge and he also declined to take the evidence. Ordinarily, this Court is most unwilling to interfere with interlocutory orders; in the present case, however, it is abundantly clear that the court below has not adopted the procedure prescribed by law. It has followed a procedure of its own, and it seems better that in an important and elaborate case like the present, the court shall be put back, so far as possible, upon the proper procedure, viz., that prescribed by law. My experience is, that when courts follow arbitrary procedure of their own invention, difficulties and confusions are sure to arise. In the present case, the accused, according to a charge-sheet which has been drawn up by the Joint Magistrate is charged with committing criminal breach of trust in respect of a sum of Rs. 46,085. A case of this kind is obviously one which should be tried by a court of session and not by a Magistrate. In saying this, I must not be understood to interfere with the powers of a Magistrate as given in section 213 of the Criminal Procedure Code. I have not heard the merits of

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the case and I know nothing further about it, beyond this that according to the complaint the accused is supposed to have been entrusted with money and to have committed breach of trust over a very large sum. As soon as this was known to the court, or perhaps, I should rather say, to the prosecution, the case should have been pushed on in the channel provided by Chapter 18 of the Criminal Procedure Code. It was on the face of it, not a case for trial in the form provided by Chapter 21. I cannot conceive any Magistrate of experience holding the opinion that the case was not one which ought to be tried by a court of session.

The Magistrate, in his order of 1st April, says that in this case the ordinary procedure of a warrant trial was followed. I venture to doubt this, but I am not concerned with going into the question further, as I hold that the case is one in which the procedure given in Chapter 18 should have been adopted. It is interesting to note here, that the complainant was represented in this Court by a Vakil of great ability and experience who admitted that the case is one in which the procedure allowed by Chapter 18 should have been followed. The point I have to see is whether there has been material irregularity in the procedure by refusing to summon the witnesses of the accused and framing the charge before their evidence, and whether, as a result of such refusal, it is expedient that the order of the 1st of April should be altered. In every enquiry into a Sessions case, a Magistrate is bound, before he draws up a charge, to take all such evidence as may be produced, (1), in support of the prosecution, (2) on behalf of the accused, and (3) as may be called for by the Magistrate. If he does not take the evidence, he errs, unless he can justify his procedure, on some such ground, let us say, that the evidence of such and such a witness produced is obviously irrelevant, or that he considers the fact in issue between the parties proved one way or the other by the evidence already produced. A Magistrate is further bound, if the complainant or the officer conducting the prosecution, or the accused applies to him, to issue process, to compel the attendance of witnesses, to issue such process, and, as a matter of consequence, to take the evidence thus caused to be produced. Here there is one exception provided by law; the Magis-

trate can record reasons showing that it is unnecessary to compel the attention of witnesses in question and can, in such a case, decline to issue process. As each witness, out of the classes mentioned above, is examined, the accused is at liberty to cross-examine him. From the wording of section 208, it seems abundantly clear, that the intention of the Code

- was that as each witness was examined, he should be then and there cross-examined and re-examined and allowed to go to his home. The Code has considerations for witnesses and their convenience; but this consideration is not, I regret, always shared by Magistrates.

The procedure under Chapter 21 is very different. Sections 208 and 256 have only to be compared to establish this. From time to time the court may, when it is necessary under section 342, put such questions to an accused person as it considers necessary. When the court has taken all the evidence produced by either complainant or accused, and examined all the witnesses compelled to attend by process, examined the accused for the purpose of enabling him to explain the circumstances appearing in the evidence against him, then—and not till then—is a Magistrate authorized to frame a charge. The procedure here differs on this point also, from the procedure laid down in Chapter 21. A charge under Chapter 21 can be framed long before this point is reached in a case, and one of the reasons, in my opinion, for this difference is, again, the convenience of witnesses. But for this, however, witnesses would be and too often are, harassed by being kept days and days waiting for a cross-examination. In the case before me, I understand, that there were one or more witnesses who would have been produced by the accused and who were in the court precincts. I understand that no application was made to the Magistrate before the charge was drawn up, to issue process to compel the attendance of any witness. I also understand that the accused was prepared to cross-examine each witness immediately after his examination. But,—as the affidavit shows,—those who appeared on behalf of the accused, being cognizant that it was the usual practice of this learned Magistrate, not to allow any cross-examination before he frames a charge sheet or till such time that the examination-in-chief of all witnesses for the

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prosecution is over, they did not press their right to cross-examine at that stage. If such be the practice of the learned Magistrate in enquiries into cases triable by a court of session, the practice is contrary to law and must be avoided in future. The accused put in a special application, before the charge was framed, to call a number of prosecution witnesses for a short cross-examination. The learned Magistrate, so the affidavit goes on, asked the counsel for the accused not to put more than six to eight questions to each witness. All this was quite irregular. The learned Magistrate had no power to curtail the cross-examination of witnesses, except as provided either in this Code or in the Evidence Act. The result of these departures from procedure has been that the accused considers himself prejudiced, and I think he has ground for so considering. In any case, as I have already said, it is expedient that the enquiry should, as far as possible, be put on the lines laid down by the law. I cancel the charge-sheet. I set aside the orders of the 1st of April. Under the peculiar circumstances of the case, opportunity should now be given to the accused to exercise the right conferred on him by paragraph 3 of section 208, provided that right is exercised at an early date. As the omission to issue process under section 208, para. 3 appears to have been partly due to the procedure adopted by the learned Magistrate, I think he would have been wiser to follow the precedent of this Court and not the precedent which he says he has followed.

Application allowed.

CHANDAR SEKHAR TEWARI

versus

BALAKDHAR DUBE.*

Mortgage—Prior and subsequent mortgage—Prior mortgagee not asserting his rights in the suit for sale by the puisne mortgagee—Res judicata—minor.

A prior mortgagee is precluded from setting up his mortgage or his rights under his decree on the mortgage in a subsequent suit for possession by a puisne mortgagee when the prior mortgagee did not assert his rights in the suit for sale instituted by the puisne mortgagee in which he was impleaded.

A minor, who is represented in a suit by a duly constituted guardian is as much bound by the decree passed in that suit as if he were of full age, when there was nothing on the record to show that there was any fraud on the part of the guardian.

SECOND APPEAL from a decree of E. E. P. Rose, Esq., Additional Judge of Gorakhpur (at Basti), confirming a decree of Munshi Harbandan Lal, Additional Subordinate Judge of Gorakhpur.

Suit for possession.

The material facts appear from the judgment.

Haribans Sakai, for the appellant.

J. N. Chaudri, for the respondent.

The following judgment was delivered by

BANERJI, J.—This appeal arises out of a suit for possession of a 3 pie 1½ suls zamindari share and for mesne profits. I must observe at the outset that the judgment of the lower appellate court is most unsatisfactory, and does not comply with the requirements of Order 41, Rule 31, of the Code of Civil Procedure. It does not set forth the points at issue, nor does it give full reasons for the decision on those issues. All that it says is, that "a competent court has already decided that the defendant's mortgage is not prior but subsequent, and as that decision has not been set aside, it operates as *res judicata*." The learned Judge does not refer to the judgment

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which he says has the effect of *res judicata*, and it is difficult to see which judgment he had in view. The facts of the case are somewhat complicated. It appears that under a registered bond, dated the 21st of May, 1879, a $5\frac{1}{3}$ pie share was mortgaged to the ancestor of the defendant. A suit for sale was brought on the basis of that mortgage, and a decree was obtained on the 30th of May, 1892. On the 20th of October, 1898, the same mortgagors executed a mortgage in favour of the plaintiff in respect of $10\frac{3}{4}$ pie which included the $5\frac{1}{3}$ pie, mortgaged to the defendant's ancestor. The plaintiff brought a suit upon his mortgage and joined as parties to it, among others, the present defendant who was at the time a minor and his brother, Kalka Prasad. Kalka Prasad had been appointed by the District Judge guardian of the minor, and he apparently was appointed by the court guardian of the minor for the suit. In that suit, Kalka Prasad, on behalf of himself and the minor, set up two mortgages of 1890 as having priority over the plaintiff's mortgage. But apparently he did not put forward the decree of the 30th of May, 1892, under which the right of the defendants as prior mortgagees under the mortgage of 1879, had been recognized and ordered to be enforced. The court, however, held that the mortgages of 1890 were not proved and passed a decree on the 25th of January, 1904, for sale of the property comprised in the plaintiff's mortgage. The decree provided that certain other mortgages held by Musammat Kabutra and others should first be redeemed by the plaintiff, but it made no such provision in favour of the defendant, so that the decree, so far as the defendant was concerned, was a decree for sale free from any incumbrance which might have existed in favour of the defendant. If the learned Judge of the lower appellate court had this decree in view, he was wrong in saying that a competent court had declared, that the defendant's mortgage was subsequent to that of the plaintiff. The court made no such declaration. The effect, however, of the decree was, as I have pointed out above, that the defendants could not take the benefit of the decree which they had obtained in 1892 on the basis of their mortgage of 1879. In execution of the decree obtained by the defendants, they caused $3\frac{1}{3}$ pie to be sold by auction and purchased it on the 27th of March, 1905. Subse-

quently, on the 26th of October, 1908, the plaintiff, in execution of his decree, caused $5\frac{1}{3}$ pie to be sold and bought it himself, but did not obtain possession of the $3\frac{1}{3}$ pie purchased by the defendants. He, therefore, brought the suit out of which this appeal has arisen for possession of that share. The defendant contended that he had priority over the plaintiff by reason of his having purchased the property under the prior mortgage of 1879 and the decree passed on the basis of that mortgage. He urged that his brother, Kalka Prasad, was a man of vicious habits, and that the decree obtained by the plaintiff in the suit in which Kalka Prasad was the defendant's guardian was fraudulently obtained as against the defendant. He, further, contended that the property purchased by him was not a part of the property purchased by the plaintiff, that is to say, that the property sold under the decrees held by the respective parties was not the same property. The court of first instance decided all these points against the defendant and decreed the claim. This decree has been affirmed by the lower appellate court. The defendant has preferred this second appeal. In my judgment the decrees of the lower courts are right. So far as the question of the identity of the property is concerned, it is clear that parts of the same property were sold in execution of the two decrees obtained respectively by the plaintiff and the defendant. The plaintiff was the mortgagee of $10\frac{2}{3}$ pie, $\frac{1}{2}$ of which, namely, $5\frac{1}{3}$ pie was subject to the mortgage in favour of Musammat Kabutra and others, which the plaintiff was ordered to redeem. That mortgage was not redeemed, so that the plaintiff brought to sale the remaining $5\frac{1}{3}$ pie. It is a part of this $5\frac{1}{3}$ pie which was purchased by the defendant. He does not pretend that he purchased any portion of the property which was held in mortgage by Musammat Kabutra and others. This point was found against the defendant by the learned Munsif, and no objection was taken in appeal to the lower appellate court on that point.

The next point is that the priority, which existed in the defendant's favour under the decree of 1892, not having been put forward in the suit brought by the plaintiff upon his mortgage of October, 1898, it is not now open to the defendant to assert that he has priority over the

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plaintiff. This is settled by the principle of the ruling of their Lordships of the Privy Council in *Sri Gopal v. Pirthi Singh* (1). The decree passed in the plaintiff's favour against the defendant is binding upon him, and although it may have been a wrong decree inasmuch as it did not safeguard the defendant's rights under his prior mortgage and prior decree, yet the defendant is precluded from claiming priority over the plaintiff whom the decree gave the right to sell the property mortgaged to him free from any incumbrance which might have existed in the defendant's favour. The defendant, however, contends that the decree is not binding upon him inasmuch as it was fraudulently obtained. This plea was taken in the memorandum of appeal to the lower appellate court but was not considered by the learned Judge. I have, however, looked into the matter, and find that there is nothing on the record to show that there was any fraud on the part of Kalka Prasad, the defendant's guardian. As I have stated above, Kalka Prasad was the certificated guardian of the defendant. He is his own brother, and as the court of first instance finds, lives jointly with him, so that the defendant was properly represented in the previous litigation by a duly constituted and legal guardian. If the guardian neglected to support the case of the defendant, and there is nothing to show that he did so deliberately, that circumstance alone would not entitle the defendant to avoid the operation of the decree. As he was represented in the suit by a duly constituted guardian and by a person who could legally act as such, he was as much bound by the decree passed in that suit as he would have been if he were of full age; see *Daulat Singh v. Raghubir Singh* (2), and *Sham Lal v. Ghasita* (3). The decree being a decree binding upon the defendant, the plaintiff, by reason of his having purchased in execution of that decree, is entitled to the property purchased by him, and the decrees of the courts below are right.

I dismiss the appeal with costs.

Appeal dismissed.

(1) [1902] I. L. R., 24 All., 429.

(2) [1894] A. W. N., p. 191.

(3) [1901] I. L. R., 23 All., 459.

ALI HUSAIN

versus

AMIN ULLAH.*

Pre-emption—Conditional decree—Deposit in court of the decretal amount excepting costs of the suit—Sufficient compliance.

Where a pre-emptor deposited in court the sum he was required to pay by the decree to the vendee less the costs awarded to him, *held* that he had completely complied with the order of the court.

EXECUTION FIRST APPEAL from a decree of Babu Murari Lal, Officiating Subordinate Judge of Cawnpore.

Suit for pre-emption.

The facts of the case will sufficiently appear from the judgment.

Tej Bahadur Sapru, for the appellant.

Sundar Lal and *Shafi-us-zaman*, for the respondent.

The judgment of the Court was delivered by

KARAMAT HUSAIN, J.—The pre-emptor succeeded in his suit for pre-emption. The first court ordered him to deposit Rs. 6,800. He carried out the order of the court. Subsequently, in execution of his own decree for costs, he attached and got a sum of Rs. 314-8-0, out of the sum deposited by him. There was an appeal in the pre-emption suit to this Court, and this Court modified the decree of the first court by ordering the pre-emptor to pay a sum of Rs. 10,000, instead of Rs. 6,800. He deposited in compliance with the order of this court an extra sum of Rs. 3,200. This deposit was made in time. The judgment-debtor took objection to this deposit on the ground that it was not a compliance with the order of the High Court inasmuch as the decree-holder had taken out the sum of Rs. 314-8-0 out of the sum previously deposited by him. The court below disallowed the objection. Hence this appeal. There is a series of decisions of this court; see *Ishri v. Gopal Saran* (1), *Bahnakand*

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June, 10.

KARAMAT
HUSAIN, J.
TUDBALL, J.

*Karamat
Husain, J.*

* E. F. A. No. 130 of 1912.

(1) [1884] I. L. R. 4 All., 351.

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v. *Pancham* ⁽¹⁾, *Permanand Raot v. Gobardhan Sakai* ⁽²⁾, and *Bechai Singh v. Shami Nath* ⁽³⁾. In all these cases it has been ruled that such a deposit as was made by the pre-emptor in this case, was a complete compliance with the order of the court. Mr. Justice TYRRELL in I. L. R., 10 All., 400, no doubt, took a different view. But we are bound to follow the other rulings of this Court with which we ourselves agree. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) [1888] I. L. R., 10 All., 400.

(2) [1906] I. L. R., 28 All., 676. S. C. 3 A. L. J. R., 804.

(3) [1910] 8 A. L. J. Notes, 27.

GHAFUR-UDDIN

versus

HAMID HUSAIN AND OTHERS.*

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June, 18.

RICHARDS, C. J.
BANERJI, J.

Transfer of Property Act (IV of 1882), section 54—Sale—How far affected by Mahomedan law.

Mahomedans have no more right to transfer immovable property without complying with the provisions of the Transfer of Property Act than any other members of the community, and to allow them to do so would, in effect, be repealing the provisions of the Transfer of Property Act so far as the Mahomedan community are concerned.

FIRST APPEAL from a decree of Babu Srish Chandra Basu, Subordinate Judge of Bareilly.

Suit for declaration under Order xxi, Rule 63, Code of Civil Procedure.

Material facts are fully stated in the judgment.

The court below dismissed the suit.

Plaintiff appealed.

B. E. O'Connor and *Gulam Mujtaba*, for the appellant.

Abdul Raoof, for the respondent.

The judgment of the Court was delivered by

Richards, C. J.

RICHARDS, C. J.—This appeal arises under the following circumstances. One Fakhr-ud-din went to Arabia on a pilgri-

* F. A. No. 274 of 1910

mage about the year 1885. It is alleged and possibly with truth, that he made an oral sale of all his property to Hamid Husain, who paid Rs. 10,000, part of the purchase money, promising to pay the balance at a later time. Hamid Husain got into possession of the property after the death of Fakhr-uddin, which took place on the 25th of January, 1899. The oral sale is alleged to have taken place in 1898. The plaintiff's sister was the wife of Fakhr-uddin and, as heir of his sister, he obtained a decree against Fakhr-uddin for dower. In execution of this decree, the plaintiff sought to attach and sell the property of Fakhr-uddin which he had, as alleged orally, sold to the defendant. The defendant objected to the attachment and sale of the property on the basis of his alleged oral purchase. The court allowed the objection on the ground that he was in possession, and hence the present suit.

The only point which has been argued in the present appeal is that this alleged oral sale created no title in the defendant, and that, therefore, the plaintiff is entitled to the declaration he seeks, even, if the oral sale was actually made as alleged by the defendant. The lower court has found that the oral sale in fact was made and dismissed the plaintiff's suit, relying on the case of *Begam and others v. Muhammad Yakub* (1). That was a case in which an oral sale had been made by a Mahomedan in favour of another Mahomedan. The purchase money was paid, and the property was handed over to the vendee. The plaintiff instituted the suit for pre-emption, and the court held that the plaintiff was entitled to succeed. The facts in that case were very different from the facts in the present case. It was a suit for pre-emption under the Mahomedan law, and this fact must clearly be borne in mind. The oral vendee had got into possession, and it may be said that the plaintiff's right to pre-emption could not be defeated merely by reason of the fact that the vendor did not comply with the provisions of the Transfer of Property Act. It is quite clear that the basis of the decision of the majority of the court in that case was that it was a suit for pre-emption under the Mahomedan law and the right of pre-emption arose if there was a complete sale under the law. It seems to us that the law which must

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(1) [1894] I. L. R., 16 All., 344.

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be applied in the present case is quite clear. Section 54 of the Transfer of Property Act provides that immoveable property of the value of Rs. 100 and upwards, can only be transferred by a duly registered instrument. It is admitted that no such instrument exists in the present case. Mahomedans have no more right to transfer immoveable property without complying with the provisions of the Transfer of Property Act than any other members of the community, and to allow them to do so would, in effect, be repealing the provisions of the Transfer of Property Act so far as the Mahomedan community are concerned. If the property in question was never duly transferred to the defendant, it remained the property of Fakhr-uddin up to the moment of his death and is liable for his debts in the hands of his heirs. The result is that, we allow the appeal, set aside the decree of the court below and decree the plaintiff's suit with costs in both courts.

Appeal allowed,

RAM PRASAD

versus

JAGRUP.*

Contract—Unconscionable bargain—Mortgage fixing 58 years for redemption.

Held, that a covenant in a mortgage-deed fixing 58 years for the mortgagor to redeem the mortgaged property was not, in the absence of fraud or duress, hard and unconscionable.

SECOND APPEAL from a decree of G. A. Paterson, Esq., District Judge of Benares, confirming a decree of Babu Murari Lal, Munsif.

Suit for redemption of a mortgage.

The facts of the case are fully stated in the judgment.

The courts below dismissed the suit.

Plaintiff appealed.

Satish Chandra Banerji, Gokul Prasad and Haribans Sahai, for the appellant.

Surendra Nath Sen, for the respondent.

The judgment of the Court was delivered by

TUDBALL, J.—The plaintiff's father, on the 19th of July, 1899, executed a mortgage with possession in favour of Jugrup. One of the terms of the mortgage was that the mortgagor would not be entitled to redeem for 58 years. The mortgagor's son brought an action on the 9th of August, 1910, for redemption of the mortgage. In paragraph 5 of his plaint he stated as follows:—"The defendant has cunningly, fraudulently, and dishonestly got the period of mortgage entered as 58 years in the deed of mortgage sought to be redeemed which is most prejudicial and improper and is legally and equitably null and void." The fraud which the plaintiff attempted to prove was that a long term was entered in the mortgage deed *without the knowledge and consent of the mortgagor*. The court of first instance dismissed the plaintiff's suit on the ground that there was non-joinder of

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* S. A. No. 496 of 1911.

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parties and that the fraud alleged by the plaintiff was not proved. The lower appellate court affirmed the dismissal. In second appeal, it is urged that such a long period as was agreed upon in this case is unconscionable and hard, and should, therefore, be set aside, and in support of this contention reliance is placed upon *Morgan v. Jeffrey's* (1), in which a term of 28 years was regarded as unreasonable. The learned Vakil for the appellant also relies upon *Bhawani v. Sheodihal* (2). We are unable to accept the contention raised on behalf of the appellant. The learned Judges, who decided *Sayad Abdul Hak v. Ghulam Jilani* (3), quote from a printed judgment in *Ganesh v. Prabhakar* (4), "the terms (35 years) may or may not have been hard, they were agreed to by adults, and there is neither allegation in the plaint nor proof in the cause that any undue advantage was taken." In the case before us, there was an allegation of fraud which has been held by the courts below not to have been proved, and, therefore, the remarks made by the learned Judges fully apply to this case, and we see no reason to set aside the decree of the courts below, especially taking into account the fact that the period of limitation for redemption in this country is sixty years, while in England it is only twelve years. The parties to the mortgage without any duress or undue influence came to that agreement, and, therefore, they cannot be allowed to go behind its terms. It was, however, contended that the recitals in the mortgage-deed show that the mortgagor was a debtor of the mortgagee, and that, therefore, the latter took advantage of the helpless condition of the former and made him accept a very hard bargain. No such case was alleged by the plaintiff in his plaint, and at this stage of the litigation we are not inclined to allow him to make a new case. A fraud only was alleged but not proved. For these reasons, we uphold the decree of the lower appellate court and dismiss the appeal with costs. As the suit is premature, it is unnecessary for us to pronounce any opinion on the question of non-joinder.

Appeal dismissed.

(1) [1910] L. R., 1 Ch., D., 620. (2) [1904] I. L. R., 26 All., 479.

(3) [1895] I. L. R., 20 Bom., 677.

(4) S. A. No. 191 of 1893, decided on August the 12th, 1895.

GIRDHARI SINGH

versus

NEELADHAR SINGH AND ANOTHER.*

*Contract Act (IX of 1872), section 23—Unlawful consideration—
Marriage brokerage contract—Hindu law.*

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June, 20.

CHAMIER, J.

A contract whereby a person promises to give his daughter in marriage to another in consideration of a sum of money, is opposed to public policy and cannot be enforced, especially when the circumstances amount to a sale of the girl by her parents in consequence of want of money.

SECOND APPEAL from a decree of Babu Gokul Prasad, Subordinate Judge of Shahjahanpur, modifying a decree of Babu Manmohan Sanyal, Munsif of Bisauli.

Suit for money.

The facts and arguments are set out in the judgment.

Jogindro Nath Mukerji, for the appellant.

Gokul Prasad, for the respondents.

The following judgment was delivered by

CHAMIER, J.—The case of the plaintiff-appellant is, that his wife died in 1317 Fasli and he was anxious to marry a second time, that the defendants came to his house and said that all their land was mortgaged and that they had to pay rent to their zamindar, and that if the plaintiff paid them Rs. 250, they would marry Musammat Imirti, a daughter of the first defendant to him in the *dola* form. The plaintiff agreed to pay the sum demanded. Shortly afterwards, he and his friends went to the defendant's house with clothes and ornaments for the girl, worth Rs. 100, which they made over to the defendants, and the plaintiff paid them Rs. 250, the sum which they had demanded, and he also gave the defendants' servants the sum of Rs. 10. The girl was brought to the plaintiff's house, but before the ceremony of marriage could be performed, the defendants carried her off and refused to allow her to be married to the plaintiff or to give up the ornaments and clothes or to return the money which they had received. The

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plaintiff has claimed a decree for Rs. 100, the price of the clothes and ornaments, and for Rs. 260, the sum which was paid to the defendants and their servants. The Munsif decreed the claim in full. On appeal, the Subordinate Judge held that the plaintiff was entitled to recover the clothes and ornaments or their value but was not entitled to recover the sum of Rs. 260, because that was paid to the defendants in pursuance of a contract which was contrary to public policy. In second appeal the plaintiff contends that the contract between him and the defendant was not contrary to public policy. In *Visvanathan v. Saminathan* (1), the plaintiff had agreed to give his daughter in marriage to the defendant's nephew in consideration of the payment of Rs. 400. It was not alleged that the money was to be dowry or settlement for the bride. Rs. 200 were paid, and the defendant gave the plaintiff a bond for the balance. In a suit on that bond it was held that the contract was not unlawful. The High Court held that having regard to the customs of the country, it was impossible to lay down a hard and fast rule that all contracts for the payment of money to the bride's father in consideration of marriage were immoral or opposed to public policy. They said that there might be cases in which such contracts might be held to be immoral, as, for instance, where money was agreed to be paid in consideration of a marriage of a very young child to an old and debauched man; but that in many cases payment might be made to facilitate a marriage in a legitimate way, and each case must be judged on its own merits. The decision in that case was approved by this Court in *Baldeo Sahai v. Jumna Kunwar* (2). In that case the defendant was a man of advanced years. His brother had been married out of the brotherhood, and no member of the brotherhood of any standing would give his daughter in marriage to the defendant. The plaintiff and her husband were poor, and they had agreed to give their daughter in marriage to the defendant, because the latter had agreed to maintain them and give them an allowance of Rs. 4 per mensem. The court held that the agreement could not be enforced as in the circumstances it was opposed to public policy. The court pointed out that on

(1) [1889] I. L. R., 13 Mad., 83. (2) [1901] I. L. R., 23 All., 495.

the plaintiff's own showing she had made the marriage of her daughter a source of gain to herself and had no regard for the happiness and welfare of the child. The Madras case, which I have cited, has been overruled by a Full Bench of the same court in *Venkata Kristnayya v. Lakshmi Narayana* (1), where it was held that a contract to make a payment to a father in consideration of his giving his daughter in marriage was immoral and opposed to public policy within the meaning of section 23 of the Indian Contract Act. The court held that the question should be decided on general principles and not with reference to the special terms of the particular contract, and they observed that an enquiry in each case as to whether in regard to the terms of the particular contract, the contract was or was not opposed to public policy, would be very objectionable. In *Dholi Das v. Fulchand* (2) it was held that a contract which entitled a father to be paid money in consideration of giving his son or daughter in marriage, was against public policy and could not be enforced. Both the Madras and the Bombay High Courts point out that the *Asura* form of marriage, as recognised by the lower castes, is nothing more or less than the purchase of a wife from her father. Though it was recognised as valid by the lower castes, it did not follow that an agreement for the payment of money on such a marriage would not be contrary to public policy. In *Wazira Mal v. Rallia* (3), it was held that an agreement by a Hindu to pay a sum of money to another in consideration of that other giving his sister in marriage was contrary to public policy. It is conceded that if the contract in the present case is contrary to public policy, the plaintiff is not entitled to recover. It is clear that, according to the decisions of the Madras and Bombay High Courts and the Punjab Chief Court, this suit should be dismissed. But I am bound to follow the decision of this Court, and I have to consider the circumstances of the present case. The plaintiff says that his age is 36 and that the age of the girl is 11. The defendants say that the age of the plaintiff is 60 and the age of the girl is 8. It has not been proved that the plaintiff is more than 36 years, and

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(1) [1908] I. L. R., 32 Mad., 185. (2) [1897] I. L. R., 22 Bom., 658.

(3) [1889] P. R. No. 128.

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I may take it that the plaintiff's statement that the girl is 11 years of age, is correct. But it is quite clear from the plaint itself that this girl was sold by the parents to the plaintiff, because they were in want of money. It was not an arrangement made upon an ordinary treaty for a marriage, and the whole sum now in question was to be paid for the benefit of the defendants alone in order to enable them to pay their rent. It appears to me that a contract of this kind is opposed to public policy, whether it is common among the lower castes or not. I, therefore, dismiss this appeal with costs.

Appeal dismissed.

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RICHARDS, C. J.

BANERJI, J.

BHOLA DAS

versus

BISHNATH LAL AND OTHERS.*

Mortgage—Construction—Securing future advances upon mortgaged property—Validity of—Transfer of Property Act (No. IV of 1882), section 58.

There is no law which prevents a party from securing future payments by a charge or mortgage upon immoveable property.

A mortgage deed provided : " He (mortgagee) shall enjoy the profits of the mortgaged lands in lieu of interest. I, the executant, shall continue to pay to the mortgagee every year the deficiency in the amount of interest ; and in case of default of payment of the same in any year, the *Mahajan* shall in that year have power to recover it from a nine anna *semindari* share, the proprietary title and other moveable and immoveable property " :

Held, that the document must be held to amount to a mortgage in respect of the deficiency in interest on the mortgage money.

FIRST APPEAL from a decree of Babu. Srish Chandra Basu, Subordinate Judge of Benares.

Suit for sale on a mortgage.

The facts and arguments appear from the judgment.

Sundar Lal and *Harendra Krishna Mukerji*, for the appellant.

Motilal Nehru and *Gokul Prasad* for the respondents.

The judgment of the Court was delivered by

Richards, C. J.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiff sought to realise Rs. 3,000 principal, together

* F. A. No. 165 of 1911.

with a large amount of interest, by the sale of a 7 anna 6 pie zamindari share in certain property. The document, upon which the plaintiff relies, is dated the 3rd of February, 1894. It will be found at page 7 of the appellant's book. It first recites that the mortgagor has borrowed Rs. 3,000, bearing interest at the rate of 12 annas per cent. per mensem. It, then, goes on to state that in-lieu of this money he has mortgaged 14 bighas, 17 biswas and 15 dhurs of land and placed the mortgagee in possession of it. This 14 bighas, 17 biswas and 15 dhurs comprised an occupancy holding. The plaintiff, in the present suit, does not seek to enforce the mortgage against this property. The mortgage, then, proceeds as follows :—"He shall enjoy the profits of the mortgaged lands in lieu of interest. I, the executant, shall continue to pay to the mortgagee every year the deficiency in the amount of interest; and in case of default in payment of the same in any year, the Mahajan shall, in that year, have power to recover it from a nine anna zamindari share, the proprietary title and other moveable and immoveable property." The 7 anna 6 pie zamindari share, it is alleged, is part of this 9 anna zamindari share referred to in the deed. It is quite clear that the principal amount is not secured on 9 anna zamindari share. We think it is equally clear that the deficiency in the interest, that is to say, any deficiency which might arise after giving credit for the profits of the 14 bighas, 17 biswas and 15 dhurs of land, was secured on the 9 anna zamindari share. It was known that there would be a deficiency at the very time the mortgage was executed, although, we do not think that this matter was very material. We know of no law which prevents a party from securing future payments by a charge or mortgage upon immoveable property. It is contended on behalf of the respondents that even if the deficiency in interest was secured on the 9 anna zamindari share on the true construction of the deed, it is secured by way of a charge and not by way of a mortgage, and reliance is placed upon the case of *Jadu Nath Poddar v. Rup Lal Podar* (1). The expression "mortgage" is defined in section 58 of the Transfer of Property Act in the following terms :—A mortgage is the transfer of an interest in specific

(1) [1906] I. L. R., 33 Cal., 967.

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immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or *future debt*, or *the performance of an engagement which may give rise to a pecuniary liability*." If the true meaning of this definition is that there never is a mortgage unless the whole estate in the property is either transferred subject to redemption, or there is a transfer for a term of years, the definition is inapplicable to the vast majority of the documents that have always been recognised as "simple mortgages" in these Provinces. Such documents never take the form of a transfer of the mortgagor's estate. The mortgagor is expressed to "hypothecate" or "pledge" the property. Clause (b) of the same section is as follows :—

"Where without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money, and agrees, expressly or impliedly, that in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee." Now, it is quite clear, that in the present case the mortgagor without delivering possession of the 9 anna zamindari share bound himself personally to pay the deficiency in the interest on the Rs. 3,000, and the deed provides that in case of default the Mahajan shall have power to recover it from the 9 anna zamindari share, that is to say, that he either expressly or impliedly contracted that the mortgagee should have a right to cause the 9 anna zamindari share to be sold. We think that the document must be held to amount to a mortgage in respect of deficiency. The court below decided the case upon this preliminary point. There are other questions which have to be decided. We, accordingly, allow the appeal, set aside the decree of the court below, and remand the case with directions to readmit the suit upon its original number in the register and to proceed to hear and determine the same according to law. Costs here and hitherto will be costs in the cause.

Appeal decreed—Cause remanded.

KHUB CHAND AND ANOTHER

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NIADAR MAL AND ANOTHER.*

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* *Civil Procedure Code (Act V of 1908), section 64, Order 21, Rule 5—
Attachment—Striking off of execution proceedings, effect of.*

The attachment of a property cannot be deemed to be withdrawn when satisfaction of the decree *in part* only is certified to the court especially when the satisfaction in part is due to the payment of the money attached.

SECOND APPEAL from a decree of C. E. Guiterman, Esq., Additional Judge of Meerut, confirming a decree of Babu Birj Behari Lal, Munsif of Kairana.

Suit for declaration.

The facts of the case appear from the judgment.

The courts below decreed the suit.

Defendants appealed.

Tej Bahadur Sapru, for the appellants.

Gobind Prasad, for the respondents.

The following judgment was delivered by

KARAMAT HUSAIN, J.—Khub Chand owed Rs. 500 to Musammat Giruari. Mitra Sen and Niadar Mal had decrees against her. The amount of the decree of Mitra Sen (No. 599 of 1908) was Rs. 724, including costs, and the amount of two decrees of Niadar Mal was Rs. 379-1-0, Mitra Sen, in execution of his decree No. 599 of 1908, attached the sum of Rs. 500, in the hands of Khub Chand on the 5th of February, 1909. Niadar Mal, on the 25th of March, 1909, put his decrees into execution and applied for rateable distribution. On the 8th of September, 1909, the assets of Giruari, save the sum of Rs. 500, were distributed, Mitra Sen got Rs. 161-12-0 and a balance of Rs. 562-4-0 remained due to him. The execution proceedings started by Mitra Sen were struck off. The order is silent as to the raising of the attachment of Rs. 500, which was effected on the 5th of February, 1909. Mitra Sen, on the 5th of January, 1910, certified

Karamat
Husain, J.

* S. A. No. 1362 of 1911.

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*Karamat
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to the court the payment of Rs. 500 to him by Khub Chand in satisfaction of his decree No. 599 of 1908, against Giruari. The result of this payment was that Rs. 62-4-0 remained due to him, and that his decree was not wholly satisfied.

On the 18th of March, 1911, the plaintiff, Niadar Mal, in execution of his decrees applied for the attachment of Rs. 500 in the hands of Khub Chand, who pleaded payment to Mitra Sen. The court, on the 8th of April, 1911, directed him to seek the remedy that may be open to him. Niadar Mal, therefore, brought an action for a declaration that he was entitled to attach the Rs. 500. One of the pleas in defence was that the money had been paid by Khub Chand to Mitra Sen, while there was no subsisting attachment and that, therefore, the plaintiff had no cause of action against Khub Chand. The court of first instance decreed the claim, and the decree was upheld by the lower appellate court.

The contention in second appeal is that the attachment of Rs. 500 came to an end as soon as the execution proceedings were struck off on the 8th of September, 1909, on the satisfaction of the decree in part.

The contention has no force. Under section 64, Code of Civil Procedure "where an attachment has been made, any private transfer or delivery of the property attached, shall be void as against all claims enforceable under the attachment". And for the purpose of section 64, Code of Civil Procedure, "claims enforceable under an attachment include claims for the rateable distribution of assets." Niadar Mal had applied for rateable distribution, and he would be entitled to the benefit of the attachment of Rs. 500 so long as the attachment thereof subsisted. Now let us see when an attachment once made comes to an end, Order 21, Rule 55, is :—

"Where—

(a) The decrees with costs and all charges and expenses resulting from the attachment of any property are paid into court, or,

(b) Satisfaction of the decree is, otherwise, made through the court or certified to the court, or,

(c) The decree is set aside or reversed, the attachment shall be deemed to be withdrawn.".....

The language of the rule leads me to infer that the attachment of a property cannot be deemed to be withdrawn; when satisfaction of the decree *in part only* is certified to the court especially when the satisfaction in part is due to the payment of the money attached. In my opinion, the attachment of Rs. 500 was not withdrawn on the 8th of September, 1909, when the execution proceedings were struck off on satisfaction of the decree in part, nor was it withdrawn on the 5th of January, 1910, when Mitra Sen certified to the court that he, in satisfaction of his decree, received Rs. 500 out of Rs. 562-4-0, from Khub Chand. As the attachment of Rs. 500 was not withdrawn and as the plaintiff was entitled to the benefit of the attachment, his suit was rightly decreed. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

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Karamat
Husain, J

MUTSADDI LAL AND ANOTHER

versus

MUHAMMAD HANIF AND OTHERS.*

Transfer of Property Act (No. IV of 1882), sections 54 and 8—Assignment of mortgagee's right by unregistered sale—Whether valid without registration.

A simple mortgage was executed on August 19, 1885. The mortgagees transferred all their rights under the mortgage to the plaintiffs by an unregistered deed of sale dated December 2, 1898. In a suit by the plaintiffs for sale, upon the mortgage on the basis of the assignment : *held*, that the suit was not maintainable

Section 8 of the Transfer of Property Act cannot be read so as to override the provisions of section 54 of the same Act. The interest of a simple mortgagee is plainly an intangible thing within the meaning of section 54, and the transfer of it can be made only by a registered instrument.

Subramaniam v. Perumal Reddi, I. L. R., 18 Mad., 454 not followed. Observations of BHASHYAM AYYANGAR, J., in *Ramsami Chinan*, I. L. R., 24 Mad., 449, 463, approved.

SECOND APPEAL from a decree of W. H. Webb, Esq., Additional Judge of Saharanpur, confirming a decree of Babu Sudarshan Dayal, Munsif of Deoband.

* S. A. No. 235 of 1912.

CIVIL.

1912.

June, 21.

CHAMBER, J.

CIVIL.

1912.

Mutsaddi Lal
v.
Muhammad
Hanif.

Suit upon a mortgage.

The facts and arguments appear from the judgment.

The courts below dismissed the suit.

Plaintiffs appealed.

A. P. Dube, for the appellants.

Nehal Chand, for the respondents.

The following judgment was delivered by

Chamier, J.

CHAMIER, J.—This was a suit for the recovery of Rs. 249, on the basis of a simple mortgage made on the 19th of August, 1885. The mortgagees transferred all their rights under the mortgage to the plaintiffs by an unregistered deed of sale, dated the 2nd of December, 1898. The present suit was instituted in August, 1910. If by the assignment only a right to proceed against the mortgagors personally passed to the plaintiffs, the suit is, admittedly, barred by limitation. The question for decision is whether the unregistered deed was sufficient to pass to the plaintiff the interests of the mortgagees under the deed of August 19th, 1885. If the decision in *Subramaniam v. Perumal Reddi* ⁽¹⁾, is correct, this question must be answered in the affirmative. But that decision was disapproved by BHASHYAM AYYANGAR, J., in the later case of *Ramsami Nath v. Chimman Asari* ⁽²⁾. The remarks of the learned Judge may have been, as contended by the counsel for the appellants, no more than *obiter dicta*, but in my opinion his view of the law is correct and the earlier decision in *Subramaniam v. Perumal Reddi* ⁽³⁾ is erroneous. In the earlier case the court relied on section 8 of the Transfer of Property Act. It appears to me that that section cannot be read so as to override the provisions of section 54 of the same Act. The interest of a simple mortgagee is plainly an intangible thing within the meaning of section 54, and the transfer of it can be made only by a registered instrument. The result is that the plaintiffs by the assignment in their favour acquired no right to sue as mortgagees. In my opinion, the decisions of the courts below are correct. I dismiss this appeal with costs.

Appeal dismissed.

(1) [1895] I. L. R., 18 Mad., 454 (2) [1901] I. L. R., 24 Mad., 449, at p. 463.

(3) [1895] I. L. R., 18 Mad., 453.

ABBU SINGH AND OTHERS

versus

KING-EMPEROR.*

CRIMINAL

1912.

June, 24.

CHAMIER, J.

*Public Gambling Act No III of 1867—Power to issue search warrant—
‘Officer invested with the full powers of a Magistrate.’*

The expression “the Magistrate of a district or other officer invested with the full powers of a Magistrate” used in section 5 of the Public Gambling Act of 1867, means a Magistrate of the first class. The appointment of a Magistrate of the first class as sub-divisional officer gives the officer in question certain additional powers in that particular area, but does not deprive him of all his powers as a Magistrate.

Hence, a search-warrant issued by such an officer for the search of a house outside the *tahsil* of which he was sub-divisional officer, was not illegal.

CRIMINAL REVISION from an order of H. Dupernex, Esq., Sessions Judge of Farrukhabad.

The facts of the case appear sufficiently from the judgment.

E. Wallach, for the applicant.

R. Malcomson (*Assistant Government Advocate*), for the Crown.

The following judgment was delivered by

CHAMIER, J.—The applicants have been convicted under sections 3 and 4 of the Public Gambling Act, 1867. The only point taken in revision is that the warrant, under which the Police searched the house of the first applicant, was issued by a Magistrate who was not competent to issue it, and, therefore, the discovery of instruments of gaming in the house did not give rise to the presumption that the house was a ‘common gaming house’, as defined in the Act. Section 5 of the Act provides that a search warrant may be issued by the Magistrate of a district or ‘other officer invested with the full powers of a Magistrate.’ This expression means a Magistrate of the first class,—see section 3 (2) of the Code of Criminal Procedure. The warrant in the present case was issued by M. Muhammad Shafi Khan, Magistrate of the first

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CRIMINAL.

1912.

Abbu Singh
v.
King-Emperor.
Chamier, J.

class, in the Farrukhabad district. In November last, he was appointed to be sub-divisional officer of two tahsils in the district. The house searched is not in either of those tahsils and it is on this account that the warrant is said to be illegal. It appears to me that there is no force in the contention. The officer in question was a Magistrate of the first class with jurisdiction extending throughout the district when he was appointed to be a sub-divisional officer. The appointment gave him certain additional powers in the area of which he became sub-divisional officer but did not deprive him of all his powers as a Magistrate. A sub-divisional Magistrate exercises Magisterial powers in matters which do not concern his sub-division, and I find nothing in the Code which suggests that this practice is contrary to law. It is true, as pointed out by counsel for the appellants, that some of the ordinary powers of a Magistrate of the first or second class, who has been appointed to be a sub-divisional officer, cannot be exercised by him except in cases arising in his sub-division or transferred to him by higher authority, but that is on account of the nature of those powers. There are other powers which any Magistrate can exercise anywhere in the district, for example, the power to command an unlawful assembly to disperse or the power to record a confession. All that section 5 of the Public Gambling Act requires is that the search warrant shall be issued by the Magistrate of a district or a Magistrate of the first class. It is impossible to hold that the Magistrate who issued the warrant in the present case was not a Magistrate of the first class. The application is rejected.

Application rejected.

POHKAR SINGH AND ANOTHER

versus

RAM DIN AND OTHERS.*

*Bundelkhand Encumbered Estates Act ([Local] No. 1 of 1903), sec. 12—
Some of the mortgagors taking advantage of the relief granted by the
Act—Effect against other mortgagors.*

* The failure of the mortgagee to make any claim against those of his mortgagors who had obtained the benefit of the Bundelkhand Encumbered Estates Act, in a case in which some of the mortgagors had, while others had not obtained this benefit, could not put the mortgagee in a worse position than he would have occupied if he had allowed the integrity of the mortgage to be broken up by permitting the holders of a share in the equity of redemption to redeem that share on payment of a proportionate amount of the debt. *Amar Chand v. Tulshi Ram*, S. A. No. 858 of 1911 (unreported), decided on the 17th May, 1912, followed.

SECOND APPEAL from a decree of H. E. Holme, Esq., District Judge of Jhansi, reversing a decree of Babu Shiva Prasad, Subordinate Judge.

Suit for foreclosure.

The facts and arguments are fully reported in the judgment.

The court of first instance decreed the suit in part, but the lower appellate court reversed the decree.

Plaintiffs appealed.

Durga Charan Banerji, for the appellants.

D. R. Sawhny, for the respondents.

The following judgment was delivered by

PIGGOTT, J.—This was a suit for foreclosure on a mortgage, dated the 21st of May, 1877. The first defendant, Ram Din, was impleaded as heir of the mortgagor, and there were some 19 other defendants impleaded as subsequent transferees. For the purpose of the appeal now before me, it is sufficient to say that Mahadeo and Bhaironi, defendants Nos. 13 and 14, have acquired the equity of redemption in one-half of the property originally mortgaged, while the remaining defendants are interested in the other half. The property in question is situated in the district of Jalaun, and it has been found that Mahadeo and Bhairon took advantage of the provisions of the Bundelkhand Encumbered Estates Act (Local) No. 1 of 1903. No claim was preferred against them in respect of the mortgage now in suit, and there is, no doubt, that they are entitled

* S. A. No. 1252 of 1911.

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PIGGOTT, J.

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1912.

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Ram Din.

Piggott, J.

to the benefit of the provisions of section 12 of the said Act, that is to say, every claim against them in respect of this deed must be deemed for all purposes and at all times to have been duly discharged.

The court of first instance, having found against the defendant on a number of other points raised, dismissed the suit as against the defendants, Mahadeo and Bhairon, but held the remaining one-half of the property to be liable for one-half of the mortgage debt and framed a decree accordingly. The remaining defendants, when appealing to the District Judge on other points, did not raise any plea to the effect that the failure of the plaintiffs to bring any claim under the Bundelkhand Encumbered Estates Act against Mahadeo and Bhairon, had the effect of extinguishing the entire mortgage, and so making it impossible for the plaintiff to recover any thing under its terms, even, from those defendants who had never applied for, or obtained the benefit of the Encumbered Estates Act. The learned District Judge, however, allowed this plea to be taken before him in argument, and I do not think that in so doing he acted outside the discretion vested in him by law. He found against the plaintiffs on the point, and, on this ground alone, and without determining any of the other questions raised before him in appeal, he has dismissed the plaintiff's suit altogether. The same question was before me in the case of *Amar Chand v. Tulshi Ram* (1), decided by me on the 17th of May, 1912. I there expressed the opinion that the failure of the mortgagee to make any claim against those of his mortgagors who had obtained the benefit of the Bundelkhand Encumbered Estates Act, in a case in which some of the mortgagors had, while others had not, obtained this benefit, could not put the mortgagee in a worse position than he would have occupied if he had allowed the integrity of the mortgage to be broken up by permitting the holders of a share in the equity of redemption to redeem that share on payment of a proportionate amount of the debt. I am still of the same opinion. The failure of the plaintiffs in this case to make any claim as against Mahadeo and Bhairon has the same effect in law as if the plaintiffs had accepted from these two defendants their proportionate share of the mortgage debt, and had

(1) S. A. No 858 of 1911.

handed over their share of the property freed from the encumbrance. The mere fact that the plaintiffs, as mortgagees, might have held the share in the possession of Mahadeo and Bhairon liable for the entire mortgage debt, and left it to those defendants to proceed against the remaining persons inherited in the mortgaged property for contribution, does not, I think, affect the question now before me. The special Judges under the Bundelkhand Encumbered Estates Act, had very wide equitable jurisdiction, and, as a matter of fact, a special return was furnished by them showing the difference between the sums awarded by them and the sums which would have been decreed by the Civil Court in respect of the same claims. In the present case, if the plaintiffs had taken notice of the proclamation of Mahadeo and Bhairon under the Bundelkhand Encumbered Estates Act, and had brought forward their claim, it would have mattered very little whether they formally claimed the entire debt, or voluntarily split up the mortgage. The award of the special Judge would have been based upon their equitable claim to one-half of the mortgage debt against one-half of the security. For these reasons, I hold the conduct of the mortgagees in failing to bring any claim under the Bundelkhand Encumbered Estates Act has had the effect of breaking up the integrity of the mortgage, and that they are now entitled to proceed against one-half of the mortgaged property for recovery of one-half of the debt. I am confirmed in my opinion by the decision of this Court in the case of *Makund Rao v. Janki Bai*⁽¹⁾. The learned District Judge endeavours to distinguish this case, and points out that the particular question now in issue was rather taken for granted than formally decided in that case. It is abundantly clear, however, that, if the learned District Judge is right in his decision in the present case, then the reported case above referred to was wrongly decided. I accept this appeal, and setting aside the decree of the lower appellate court, remand this case under Order 41, Rule 33, of the Code of Civil Procedure, for a decision on the merits on the pleas actually taken by the contesting defendants in their memorandum of appeal to that Court. Costs will abide the event.

Appeal decreed—Cause remanded.

(1) [1908] I. L. R., 30 All., 141.

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 v.
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 Piggott, J

CHADAMMI

versus

LALTA PRASAD AND ANOTHER.*

CRIMINAL

1912.

June, 27.

KARAMAT
HUSAIN, J.
TUDBALL, J.*Criminal Procedure Code (Act V of 1898), sections 195, 476—Judicial proceeding.*

When a case under section 195 of the Code of Criminal Procedure is taken up to a higher court in revision, the proceedings in the higher court relating to sanction are undoubtedly judicial proceedings. The function exercised by the higher court in upholding the order of the court below or reversing it, is, beyond doubt, a judicial act.

CRIMINAL REVISION from an order of E. C. Allen, Esq., Sessions Judge of Mainpuri.

The facts of the case appear sufficiently from the judgment.

E. A. Howard, for the applicant.

R. Malcomson (Assistant Government Advocate), for the Crown.

The judgment of the Court was delivered by

Karamat
Husain, J.

KARAMAT HUSAIN, J.—In this case sanction for prosecution under sections 193 and 211, Indian Penal Code, was granted by the court of the Assistant Sessions Judge who revoked the sanction, but taking action under section 476 of the Code of Criminal Procedure, directed the prosecution of the applicant and sent the record to the District Magistrate with the request that the complaint be made over to a competent Magistrate for disposal according to law. The applicant comes here in revision, and his learned counsel urges that the learned Sessions Judge had no jurisdiction to take action under section 476 of the Code of Criminal Procedure. In support of this contention he relies upon the case *In the matter of the petition of Mathura Das* (1). The case, no doubt, supports the contention. In that case a learned Judge of this Court was of opinion that when a matter is taken up in revision to a higher court under section 195 of the Code of Criminal Procedure, the proceedings in the higher court cannot be deemed to be judicial proceedings.

* Cr. Rev. No. 341 of 1912.

(1) [1892] I. L. R., 16 All., 80.

The learned Judge, who decided that case in the course of his judgment, said :—" It is evident that the offences were not committed in the court of the District Judge, so that he has no jurisdiction under section 46, unless it can be held that they were brought under his notice in the course of a judicial proceeding. Even if an application under section 195, can be held to be judicial proceeding, I do not think it would be held without straining the language of the section that when an application is presented for sanction to prosecute for an offence, that offence is brought to the notice of the court in the course of a judicial proceeding, there being no other judicial proceeding before the court than the application for sanction. Taking this view of the case, I am of opinion that the District Judge had no power to take action under that section." With due respect to the learned Judge, we are of opinion that when a case under section 195 of the Code of Criminal Procedure is taken up to a higher court in revision, the proceedings in the higher court relating to sanction are undoubtedly judicial proceedings. These proceedings, in no way, can be regarded as other than judicial proceedings. The function exercised by the higher court in upholding the order of the court below or reversing it is beyond doubt a judicial Act. Besides, it seems highly improbable that the higher court, when a case under section 195 of the Code of Criminal Procedure comes before it in revision, should not have the power to rectify the mistake, if any, committed by the court below. There are many cases in which the sanction for prosecution obtained by an applicant from the court of first instance is not utilized for the benefit of the public. It is often used as the means of gaining some private object, and that being so, it is highly desirable that the higher court should take away that power from the hands of a private person and to give it to the public authorities or institute the complaint itself. This being our view, we are of opinion that the learned Sessions Judge had jurisdiction to take action under section 476 of the Code of Criminal Procedure, because the offence was brought to his notice in the course of a judicial proceeding. We, therefore, reject the application.

CRIMINAL.

1912.

Chadammi

v

Lalta Prasad.

*Karamat
Husain, J.**Application rejected.*

CIVIL.

1912.

June, 20.

BADRI MALLAH AND ANOTHER

versus

SUDAMA MAL AND OTHERS.*

CHAMIER, J. *Agia Tenancy Act (No. II of 1901), sections 20 and 21—Mortgage of occupancy holding in favour of the zamindar—'Voidable'—Meaning of.*

Section 31 of the Tenancy Act is not intended to affect the express provisions of section 20 of the Act that the interest of an occupancy tenant is not transferable except as between certain persons. It is well known that the provisions of section 9 of the old Rent Act of 1881 and of section 20 of the present Act, were enacted in the interest as much of the tenant as of the landlord. An occupancy tenant is not competent to transfer his interest to his landlord otherwise than in the manner provided in the Act, namely, by relinquishment of the holding.

Held also, that a simple mortgage by an occupancy tenant of his interest in his holding in favour of his landlord is void whether made before or after the Tenancy Act

SECOND APPEAL from a decree of F. D. Simpson, Esq., District Judge of Gorakhpur, reversing a decree of Babu Bansgopal, Munsif of Deoria.

Suit for sale on a mortgage.

The facts are fully set out in the judgment.

Iswar Saran, for the appellants.

Tej Bahadur Sapru and *Parmeshwar Dayal*, for the respondents.

The following judgment was delivered by

Chamier, J.

CHAMIER, J.—This was a suit upon a mortgage of a grove. The mortgagor is a tenant of the mortgagee. It was found by the first court that the trees mortgaged stood on what is the occupancy holding of the mortgagor. The Munsif dismissed the suit, holding that a simple mortgage of an occupancy holding is void. On appeal, the District Judge held that the mortgage was valid because it was made in favour of the mortgagor's landlord. He seems to have been led to this conclusion by section 31 of the Tenancy Act. It has been observed, more than once, that this section is

* S. A. No. 85 of 1912.

not happily worded. In *Ram Sarup v. Kishan Lal* ⁽¹⁾ it was held that the word "voidable" in this section is used not in the sense in which that term is ordinarily used, and that the section was not intended to show that a transfer contrary to the provisions of section 20 was voidable only and not void, but was intended to give a special remedy to the landholder. It seems to me that the section was not intended to affect the express provisions of section 20 of the Act that the interest of an occupancy tenant is not transferable except as between certain persons. It is well known that the provisions of section 9 of the old Rent Act of 1881 and of section 20 of the present Act were enacted in the interest as much of the tenant as of the landholder. I am unable to hold that an occupancy tenant may transfer his interest to his landlord otherwise than in the manner provided in the Act, namely, by relinquishment of the holding. It cannot be suggested that the transaction in the present case amounts to a relinquishment of the holding. I have no hesitation in holding that a simple mortgage by an occupancy tenant of his interest in his holding in favour of his landlord is void whether made before or after the Tenancy Act. Under the old Act it was held that an occupancy tenant might make a usufructuary mortgage of his holding. That is forbidden by the new Act. Before this appeal can be disposed of, I must have definite findings by the lower appellate court on the first part of the first issue and on the third issue. Let the record be returned to that court in order that definite findings may be recorded on those issues. Further evidence will not be admitted. On return of the findings ten days will allowed for objections.

Issues remitted.

(1) [1907] I. L. R., 29 All., 327.

CIVIL.

1912.

Badri Mallah
v.
Sudama Mal.
Chamier, J.

CIVIL.

1912.

July, 1.

PIGGOTT, J.

RAM NARAIN SINGH AND OTHERS

versus

RAMPAT BHAGAT AND OTHERS.*

Agra Tenancy Act (II of 1901), Local—sections 79, 167—Jurisdiction—Civil and Revenue Courts—Mortgagee in possession of fixed rate holding—Payment of rent by him to the landholder—Tenant—Dispossession.

A usufructuary mortgagee of a fixed-rate tenancy, in possession of the holding under the terms of his mortgage and paying rent for the same to the landholder is a tenant of the holding within the meaning of section 79 of the Tenancy Act, and a suit for possession of such holding is not maintainable in the Civil Court under section 167 of that Act.

SECOND APPEAL from a decree of Pandit Sri Lal, District Judge of Ghazipur, confirming a decree of Babu Ganga Nath, Munsif of Ballia.

Suit to recover possession of a fixed-rate tenancy by a usufructuary mortgagee.

Suit for possession.

The courts below decreed the suit.

Defendants appealed.

The facts and arguments appear from the judgment.

M. L. Agarwala, for the appellants.

Nawab Muhammad Abdul Majid, *Benode Behari*, and *Parmeshwar Dayal*, for the respondents.

The following judgment was delivered by

Piggott, J.

PIGGOTT, J.—The facts essential to the disposal of this appeal may be stated as follows :—Murat and Lakhan mortgaged with possession to the plaintiffs four plots of land held by them as tenants-at-fixed rates. The plaintiffs entered into possession under their mortgage and presumably must have paid rent for the holding to the landholders. Both the mortgagors having died, the landholders claimed to enter into possession of the holding on the ground that the fixed-rate tenants had left no heirs entitled to succeed to the same. The matters came before the Revenue Courts under those sections of the United Provinces Land Revenue

* S. A. No. 1270 of 1911.

Act (Local), Act III of 1901, which deal with the maintenance and correction of the annual registers. Their decision was in favour of the landholder and the latter succeeded in obtaining actual possession over the plots of land in question. In this suit filed in the court of the Munsif of Ballia, the plaintiffs sued the landholders as defendants of the first party, and one Dayal, whom they described as the successor by inheritance to the estate of the mortgagor Lakhan, as defendant of the second party. They claimed possession of the plots of land in suit as a fixed-rate tenancy, and, in the alternative, they asked for a simple money decree. Questions of limitation and jurisdiction were raised in both the courts below and have been decided by them in favour of the plaintiffs. I have to consider, first of all, whether the court of first instance, the Munsif of Ballia, was or was not debarred from taking cognizance of this suit by the provisions of section 167/79, of the Agra Tenancy Act (Local), Act II of 1901. This question depends mainly on whether the usufructuary mortgagee of a fixed rate tenancy, in possession of the holding under terms of his mortgage and paying rent for the same to the landholder, is or is not a "tenant" of that holding within the meaning of section 79, aforesaid. I am clearly of opinion that he is. The definition of the word 'tenant' in section 4 of the same Act is the "person by whom the rent of the holding is payable." A fixed rate tenancy is transferable; and it seems to me that when possession of the same has been transferred to a usufructuary mortgagee, the said mortgagee is the person by whom the rent of the holding is payable and whom the landholder will be obliged to implead in a suit for arrears of rent. If this view is correct, then, the plaintiffs in the present case are tenants who have been ejected by their landholders otherwise than in accordance with the provisions of the Tenancy Act. They could, therefore, have brought a suit against the landholders-defendants, for recovery of the possession of the holding, and for compensation for wrongful dispossession, under section 79 of the Tenancy Act. The court of the Munsif of Ballia was, therefore, debarred by section 167 of the same Act, from taking cognizance of this dispute as between the plaintiffs and the

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v.

Rampat Bhagat

Piggott, J.

defendants of the first party, because it was a dispute in respect of which a suit might have been brought under section 79. The District Judge, however, when the matter came before him in appeal, might have dealt with the case under section 197 of the Agra Tenancy Act. In order to do this, he would have had to determine whether or not a suit by the plaintiffs for recovery of possession of this holding under section 79 of the Tenancy Act was barred by limitation on the date on which the suit in the Munsif's court was filed. I, therefore, call for finding on the following issue. How long before the institution of the present suit had the defendants, landholders, taken actual possession of the plots of land in dispute as against the plaintiffs ?

The learned District Judge is, at liberty, in the event of additional evidence being tendered by either party on this issue, either to record such evidence himself or to remand the case to the court of first instance for recording the same, due regard being had to the provisions of section 197 of the Agra Tenancy Act. On receipt of the finding ten days will be allowed for objections.

Issue remitted.

SESPURI

versus

DWARKA PRASAD.*

CIVIL.

1912.

July, 1.

PIGGOTT, J.

Hindu Law—Marriage Nihang Goshains—Marriage of a Nihang Goshain formerly a Thakur with woman formerly a Brahman but had become a Nihang Goshain—Custom.

The marriage of a person who is a Thakur by caste with a woman of the Brahman caste, is forbidden by the Hindu law and the offspring of such union is not legitimate.

Padam Kumari v. Suraj Kumari, I. L. R., 28 All., 458, referred to.

The fact that the couple had, before marriage, entered the same order of faith, namely, that of *Nihang Goshains*, is immaterial in the absence of evidence of a custom prevailing in that order which recognises union between any man and any woman of that order.

SECOND APPEAL from a decree of Saiyid Muhammad Ali, Esq., District Judge of Banda, reversing a decree of Lala Achal Behari, Subordinate Judge.

The facts of the case appear sufficiently from the judgment of the Court.

The court of first instance decreed the suit, but the lower appellate court reversed the decree.

Plaintiff appealed.

Tej Bahadur Sapru (with him *Satish Chandra Banerji*), for the appellant.

Baldev Ram Dave (for *Sundar Lal*), for the respondents.

The following judgment was delivered by

PIGGOTT, J.—The only question in issue in this case is whether the plaintiff, Sespuri, is the legitimate son of one Sidha. Sidha was a Thakur by caste, and he contracted a union with a woman of the Brahman caste, from which the plaintiff Sespuri is alleged to have been born. Such union is *prima facie* forbidden by the Hindu law. It cannot amount to a legal marriage, and its offspring cannot be said to be legitimate issue. In the case of *Padam Kumari v.*

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* S. A. No. 1143 of 1911.

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v.

Dwarka Prasad.

Piggott, J

Suraj Kumari ⁽¹⁾ a Bench of this Court held that a marriage between a man of the Brahman caste and a woman who was a Chhathri or Rajput by caste, is not lawful in these provinces and the issue of such marriage is not legitimate. The present case is a very much stronger one, because even those ancient writers, who have hesitated altogether to condemn a marriage between a man of higher caste, and a woman of lower caste, have been clear in their condemnation of such a union as the present, where the position is reversed. It is contended, however, that there is one circumstance which takes the present case outside of the ordinary rule. The plaintiff's father, Sidha, had joined a religious order. He had become a Nihang Goshain, and the plaintiff's mother also had joined that order before their union. This might possibly help the plaintiff if he could prove a valid custom binding upon all Nihang Goshains, which recognises as lawful a marriage between any man and any woman belonging to that order, whatever their previous position in the world might be. The direct contrary is the case. The Nihang Goshains are a celibate order, who are not supposed to marry at all. I fail to see, therefore, how the fact that the plaintiff's father and mother violated one rule which was binding upon them as members of a religious order can excuse or validate their union in defence of a general principle of Hindu law. I concur in the finding of the lower appellate court against the legitimacy of the plaintiffs and dismiss the appeal with costs.

Appeal dismissed.

(1) [1906] I. L. R., 28 All., 458. S. C. [1906] 26 A. W. N., p. 83.

ABDUL AZIZ

VERSUS

BASDEO SINGH AND OTHERS.*

Abatement of suit—Suit for rent of a fixed rate holding—Death of the tenants.

The liability of fixed-rate tenants in respect of the rent of their holding appears to be joint and several. Where, therefore, the liability of the defendants to a suit is joint and several, and during the pendency of an appeal therefrom one of them died, upon the failure of the plaintiff to bring his representatives on the record in time, the appeal will abate only so far as the deceased defendant is concerned.

Jay Gobind Laha v. Mannatha Nath Banerji, I. L. R., 33 Cal., 580 followed.

SECOND APPEAL from a decree of J. H. Cumming, Esq., District Judge of Jaunpur, confirming a decree of Pandit Mahesh Bal Dikshit, Assistant Collector, First Class, of Jaunpur.

Suit for rent of a fixed rate tenancy.

The courts below dismissed the suit.

Plaintiff appealed.

The facts and arguments sufficiently appear from the judgment.

W. K. Porter, Surendra Nath Sen and Muhammad Ishaq, for the appellant.

A. H. C. Hamilton, A. E. Ryves, Satya Chandra Mukerji and Satish Chandra Banerji, for the respondents.

The judgment of the Court was delivered by

CHAMIER, J.—This appeal arises out of a suit brought against several persons for the rent of a fixed rate holding. The suit was dismissed by the court of first instance, and the plaintiff appealed to the District Judge. While the appeal was pending, one of the defendants-respondents died, and the plaintiff-appellant failed to apply to the court within the prescribed time to make his heirs respondents in his place.

* S. A. No. 311 of 1911.

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1912.

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CHAMIER, J.
MUHAMMAD
RAFIQ, J.

Chamier, J.

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v.

Basdeo Singh.

Chamier, J.

The court then held that the appeal was not maintainable against the remaining respondents, and with reference to a prayer that the court should consider the case under section 5 of the Limitation Act, the court held that that section did not apply to the appeal. The result was that the appeal was dismissed. This is a second appeal by the plaintiff on whose behalf it is contended (1) that the liability of the defendants to the suit was joint and several and not joint only, and therefore the appeal should have been allowed to proceed against the surviving respondents; (2) that section 5 of the Limitation Act applied to the case. On the first point the case seems to be covered by the decision of the Calcutta High Court in *Joygobind Laha v. Manmatha Nath Banerji* (1). That was a suit against several persons for the recovery of the rent of a holding. After an appeal had been filed by the plaintiff, one of the defendants-respondents died, and no attempt was made by the appellant to get the legal representatives of the deceased respondent substituted on the record. The remaining respondents objected that the appeal could not proceed. The court held that as the liability of the holders of the tenure was joint and several, the appeal could proceed against the surviving respondents, and that it abated only as far as the deceased respondent was concerned. There seems to be no reason for distinguishing between the liability of several holders of a fixed rate tenure and the liability of several tenants of any other holding. The liability of fixed rate tenants in respect of the rent of their holding appears to be joint and several. The case is, therefore, on all fours with the case decided by the Calcutta High Court. In this connection, we may refer to the case of *Muhammad Askari v. Radhe Ram Singh* (2), where the court held that the effect of section 43 of the Indian Contract Act was to exclude the right of a joint contractor to be sued along with his co-contractors. We allow this appeal, set aside the decree of the lower appellate court, and remand the case to that court to be restored to the pending file and disposed off according to law. Costs in this Court will be costs in the cause.

Appeal decreed—Cause remanded.

(1) [1906] I. L. R., 33 Cal. 580. (2) [1900] I. L. R., 22 All., 307.

MUHAMMAD HASAN AND ANOTHER

versus

NOOR JAHAN*.

CIVIL.

1912.

July, 2.

PIGGOTT, J.

Jurisdiction—Small Cause Court—Arrears of maintenance—Indian Contract Act (No. IX of 1872), sections 24 and 26—Contract in restraint of marriage

A suit for a sum of money by way of damages, as arrears of maintenance under the terms of an agreement, falls within the description of a suit for maintenance and is not cognizable by a Court of Small Causes.

There is nothing illegal in a covenant to pay a woman certain annuity until death or marriage or during widowhood.

An agreement, the consideration for which was that the plaintiff relinquished on her part certain claims she had by inheritance to property in the hands of the defendants who, in return, promised to pay her a certain sum of money by way of maintenance, but who, at the same time, qualified their promise by saying that they would not continue the payment in the event of her marrying again, unless, indeed, she married, a son of one or other of themselves, was *held* not to be void as being in restraint of marriage.

SECOND APPEAL from a decree of C. E. Guiterman, Esq., Additional Judge of Meerut, confirming a decree of Babu Ramanugrah Lal, Munsif of Muzaffarnagar.

Suit for recovery of money as arrears of maintenance.

The courts below decreed the suit.

Defendants appealed.

The facts and arguments are fully set out in the judgment.

A. H. C. Hamilton, for the appellants.

Sunder Lal, for the respondents.

The following judgment was delivered by

PIGGOTT, J.—In this case, the plaintiff, Musammat Noor Jahan, claimed from the defendants a sum of Rs. 375, with interest, by way of damages, as arrears of maintenance for three years, at the rate of Rs. 125 a year, on the plea that they were bound to pay her the said sum annually under the terms of an agreement, dated April 24th, 1908. The suit

* S. A. No. 297 of 1912

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has been decreed by both the courts below, and the defendants come here in second appeal.

A preliminary objection is taken that no second appeal lies. This point is concluded by authority. In *Bhagwant Rao v. Ganpat Rao* ⁽¹⁾, *Saminatha Ayyan v. Mangalathammal* ⁽²⁾, *Anritmoye Dasia v. Bhogiruth Chundra* ⁽³⁾, and in *Baldeo Sahai v. Jumna Kunwer* ⁽⁴⁾, it was held that suits of similar nature to the present fell within the description of suits for maintenance and were not cognizable by a court of Small Causes. A second appeal, therefore, does lie.

The first point taken in the defendant's memorandum of appeal has no weight. The plaintiff sues to enforce an alleged liability laid on the defendants by a registered instrument duly executed by them. The fact that this particular instrument was not also executed by the plaintiff, can be no bar to the suit.

Secondly, it is contended that part of the consideration in return for which the defendants undertook to pay the plaintiff Rs. 125 a year, was a promise by the plaintiff not to marry any one except a son of one or other of the defendants. From this, it is argued that such an agreement, being in restraint of marriage within the meaning of section 26 of the Indian Contract Act (Act IX of 1872), renders the entire contract void by reason of the operation of section 24 of the same Act. I am unable to accede to this contention. The consideration offered by the plaintiff was the relinquishment on her part of certain claims she had by inheritance to property in the hands of the defendants; in return the latter promised to pay her Rs. 125 yearly, by way of maintenance, but qualified their own promise by saying that they would not continue the payment in the event of her marrying again, unless, indeed, she were to marry a son of one or other of themselves, in which case they were willing to continue the payment. I do not infer from this a promise on the part of the plaintiff not to marry again, or any restraint on her liberty to do so if she chooses, much less, an undertaking on her part to marry any particular person. There is nothing illegal in a covenant

(1) [1891] I. L. R., 16 Bom., 267.

(2) [1896] I. L. R., 20 Mad., 29.

(3) [1887] I. L. R., 15 Cal., 164.

(4) [1901] I. L. R., 23 All., 495.

to pay a woman a certain annuity "until death or marriage," or "during widowhood." It has been held in England that a covenant to pay a woman an annuity of £ 40 for life, with a provision for its reduction to £ 20 in case of her marriage, is not void on the ground of being in restraint of marriage. *Grace v. Webb*.⁽¹⁾ In any case the defendants have received the consideration promised by the plaintiff, and they cannot back out of their contract merely because the plaintiff acquiesced in what was virtually nothing more than a condition imposed by the defendants themselves limiting the continuance of the annuity to the plaintiff's widowhood.

Exception is also taken to the decree for interest. I think the plaintiff was entitled to interest by way of damages, the covenant being one to pay her Rs. 125 a year in certain specified instalments.

The deed in suit hypothecates certain property as security for payment of the annuity, but I see no reason why the plaintiff should not claim a simple money-decree if she so please. No question of limitation arises.

These findings dispose of the appeal, which is hereby dismissed with costs, including fees on the higher scale.

Appeal dismissed.

(1) [1848] 18 L. J., Ch., 13.

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CHAMIER, J.

MUHAMMAD HUSAIN AND ANOTHER

versus

ILAHÍ BAKHSH.*

Provincial Insolvency Act No. III of 1907—Section 13 (1)—Grounds for dismissing petitions for insolvency.

A person who petitions to be declared insolvent not unfrequently at some stage or another of the proceedings endeavours to keep back a portion of his property or pretends that property which belongs to him does not belong to him. Action of this kind on the part of a debtor or the suspicion or belief that such action is contemplated by a debtor is not a good ground for dismissing a debtor's petition in insolvency. Such cases, are distinguished from the cases in which the petitions are dismissed as having been presented for inequitable or collateral purposes.

Girwardhari v. Jai Narain, I. L. R., 32 All., 645.

Kali Kumar Das v. Gopi Krishna Ray, 15 C. W. N., 990, referred to.

FIRST APPEAL from an order of F. D. Simpson, Esq., District Judge of Gorakhpur.

Application to be declared an insolvent. It was rejected by the District Judge.

Applicants appealed.

The facts are set out in the judgment.

Girdhari Lal Agarwala, for the appellants.

Tej Bahadur Sapru, for the respondent.

The following judgment was delivered by

Chamier, J.

CHAMIER, J.—This is an appeal against an order of the District Judge of Gorakhpur, rejecting the petition of the appellants to be declared insolvent. The ground given for the rejection of the petition is that it was not presented in good faith and that the appellants' object was not really to surrender their property and to be cleared of their debts, but to evade payment by setting up a title in their father to certain property against the receiver and to avoid imprisonment for debt. In appeal it is contended that the case is covered by a decision of two Judges of this Court in F. A. F. O.,

* F. A. F. O. No. 60 of 1912

No. 33 of 1912, delivered on May 31st last. In that case the same learned District Judge had dismissed the petition of a debtor to be declared an insolvent on the ground that he had falsely pleaded that he was separate in estate from his father and brothers, and his object was to prevent his creditors from touching certain family property of which he was, in fact, the manager. The District Judge had dismissed the petition on the ground that it was an abuse of the process of a court and had relied on my decision in *Girwardhari v. Jai Narain*,⁽¹⁾ in the course of which I said that an insolvency petition might be dismissed if it was presented not with the *bonâ fide* view of obtaining an adjudication but for an inequitable or collateral purpose. But this Court held that the petition ought not to have been dismissed. It seems to me impossible to distinguish the present case from that case. Here the District Judge thinks that the object of the debtors is to prevent their creditors from obtaining satisfaction of their claims out of family property. Indeed, the only possible distinction between the two cases is that the former case was the case of a Hindu family, and the present case is the case of a Mahomedan family. But as the members of this Mahomedan family are said to be carrying on a soap business jointly, there is really no distinction between the two cases. In the cases of *Kali Kumar Das v. Gopi Krishna Rai* ⁽²⁾, the petition of a debtor to be declared insolvent had been dismissed on the ground that the debtor had not produced the account-books of his business and had not satisfactorily explained the omission, and there were other grounds for doubting whether the petitioner had truly disclosed all the material facts. The District Judge said that he was not satisfied that the petitioner was unable to pay his debt. But the High Court set aside the order of the District Judge, observing that the fact that the Judge was unable to satisfy himself that the petitioner was unable to pay his debt, was not a ground for dismissing the petition. The case before me and the cases in this Court and the Calcutta High Court to which I have referred, are cases of a very common type. A person who petitions to be declared insolvent not unfrequently at some stage or another of the proceedings, endeavours to keep back a portion of his property or pretends that pro-

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Chamier, J.

(1) [1910] I. L. R., 32 All., 645. (2) [1911] 15 C. W. N. 990

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perty which belongs to him does not belong to him. It appears to me that action of this kind on the part of a debtor or the suspicion or belief that such action is contemplated by a debtor is not a good ground for dismissing a debtor's petition in insolvency. Such cases are easily distinguished from the cases referred to by me in *Girwardhari v. Jai Narain* (1), in which the petitions were dismissed because they had been presented for inequitable or collateral purposes. Moreover, on the evidence, I think, that it is not safe to hold on the evidence now on the record that the appellants in this case are interested in the soap business carried on by their father. Further evidence will, no doubt, be available hereafter, and what I say now must not be treated as a decision of the question. For the above reasons, I am of opinion that this petition ought not to have been dismissed. I allow this appeal, set aside the order of the District Judge and direct that the record be returned to him in order that the case be disposed of according to law.

Cause remanded.

(1) [1910] I. L. R., 32 Cal., 645.

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PIGGOTT, J.

HABIBULLAH KHAN AND ANOTHER

versus

LALTA PRASAD AND ANOTHER.*

Civil Procedure Code (Act V of 1908), Order 21, Rule 23—Burden of proof.

It is not a good ground for passing an order of remand under Order XLI, Rule 23 of the Code of Civil Procedure, to say that the preliminary issue has been decided by the court of first instance on a wrong view of the burden of proof, unless the appellate court also finds that that decision is wrong.

FIRST APPEAL from an order of J. B. Mundle, Esq., Additional Judge of Bareilly.

* F. A. F. O. No. 55 of 1912.

The facts of the case appear sufficiently from the judgment.

The court first instance dismissed the suit but the lower appellate court reversed the decree and remanded the suit for trial on the merits.

Defendants appealed.

- *B. E. O'Connor*, for the appellants.

J. M. Banerji (for *Satish Chandra Banerji*), for the respondents.

The judgment of the Court was delivered by

PIGGOTT, J.—The plaintiffs in this case are the proprietors of village Bakhshpur in the Pilibhit district, and the defendants are the holders of certain *muafi* lands situated within the same village. It appears that the *muafi* lands held by the defendants are on the boundary of the village, at a point where it is subject to fluvial action by the Khakhra river. The real dispute between the parties is whether certain land, accreted to village Bakhshpur by alluvion through the action of the Khakhra river at this point, accrues to the *muafi* lands of the defendants and becomes a part of their *muafi* holding, or accrues to the village of Bakhshpur as a whole and becomes a portion of the village lands of which the plaintiffs are proprietors. This was the first point raised by the pleadings. The defendants further pleaded that the plaintiff's suit was barred by limitation, as they had never been in possession within 12 years of the institution of the suit of any portion of the land claimed. The court of first instance held that the plaintiffs were bound to prove their possession within limitation in respect of this land and finding that they had failed to do this, dismissed the suit on the issue of limitation only. On appeal the learned Additional Judge has neither held that the suit is barred by limitation nor that it is not so barred. He says that the court of first instance has mislaid the burden of proof and that it was for the defendants to show that they had been in possession for more than 12 years before the institution of the suit. On this he has decreed the plaintiff's appeal, and remanded the case under Order 41, Rule 23, Code of Civil Pro-

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Piggott, J.

cedure, for disposal on the merits, the effect of his Order is to put the parties in a difficulty as it is open to question whether the learned Munsif accepting the directions of the lower appellate court regarding the burden of proof, could still find that the suit is barred by limitation. In any case, it is not a good ground for passing an order of remand under Order 41, Rule 23, to say that the preliminary issue has been decided by the court of first instance on a wrong view of the burden of proof unless the appellate court also finds that that decision was wrong. Regarding this question of the burden of proof we have heard both parties, and we think it desirable to make one or two remarks. The suit as framed was undoubtedly one to which article 142 of the 1st Schedule of the Indian Limitation (Act No. VIII of 1908), would apply, and the learned Munsif was right in saying that on the suit thus framed, it lies on the plaintiffs to prove both title and possession within limitation. We think, however, that the first court did not fully realise the sort of evidence which might, perhaps, have been sufficient to discharge the burden of proof laid on the plaintiffs in this matter. If the suit is to be disposed of on the limitation issue alone without any finding on the question of title (and we are not sure that this is, in fact, a suitable way of disposing of the present case), that issue will have to be disposed of on the assumption that the plaintiffs are right and the defendants are wrong on the issue of title. Looking at the case in this way, it could be open to the plaintiffs to prove that the land in suit had accrued by alluvion within limitation, or that although it had accreted more than 12 years before the institution of the suit, it had remained within the limitation period, waste or jungle land, in respect of which the presumption would arise that possession went with title. The law on this point is laid down in *Jagadindra Nath Rai v. Hemanta Kumari Devi* (1). We may remark on this point that the evidence of the settlement papers as to actual possession does not seem to have been considered at all by the lower appellate court, there is a presumption that the possession of the parties was correctly shown in those records until the contrary is proved.

(1) [1912] 8 A. L. J. R., 1176.

We set aside the order of the Additional Judge and direct that court to readmit the appeal to its file of pending cases and dispose of it according to law, with due regard to the remarks made in this order. If the lower appellate court is of opinion that the case cannot be disposed of on the question of limitation without a finding on some other issue, it will, of course, be open to it to exercise its powers under Order 41, Rule 25, Code of Civil Procedure. But the case should not be remanded under Rule 23 of that Order unless the finding on the question of limitation is definitely reversed. Costs here and hitherto will abide the event.

Appeal allowed—Cause remanded

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PRIVY COUNCIL.

LOFTUS OTWAY CLARKE

versus

BROJENDRA KISHORE ROY CHOWDHURY
AND ANOTHER.

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April, 30,
May, 1,
June, 18.

LORD

MACNAGHTEN,
LORDATKINSON,
LORD SHAW,
SIR JOHN EDGE,
MR. AMEER
ALI.

Criminal Procedure Code (Act V of 1898), section 96 and Form VIII of Schedule V—Power of a Magistrate to issue search warrant—Court—Magistrate—Indian Arms Act (No. XI of 1878), section 25—Act for the Protection of Judicial Officers (Act XVIII of 1850).

Held, reversing the High Court, that the Code of Criminal Procedure (Act V of 1898), uses the terms "Court" and "Magistrate" generally if not always as convertible terms, and that Form VIII of Schedule V of the Code, contemplates the issue of a search warrant by a Magistrate under section 96 of the Code, before any proceedings of any kind are initiated under the Code before him and in view of an "inquiry about to be made" by him under the Code.

Held, affirming the High Court, that the words "having first recorded the grounds of his belief" in section 25 of the Indian Arms Act (No. XI of 1878), prescribe a preliminary condition, and that a Magistrate has no power to make a search under that section without having complied with that preliminary condition.

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v.

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A Magistrate in directing a general search in view of an inquiry under the Code of Criminal Procedure is acting in the discharge of his judicial functions, and in an action against him for trespass in respect of the search so made, he may, if necessary, appeal for protection to the Act for the protection of judicial officers (Act XVIII of 1850).

L. O. Clarke v. Brojendra Kishore Roy Chowdhury, [1909] I. L. R., 36 Cal, 433, partly affirmed and partly reversed.

CONSOLIDATED APPEALS, by special leave, from a judgment and decree of the High Court of Judicature at Fort William in Bengal (February 20, 1909), affirming the judgment and decree of the said High Court in its extraordinary original jurisdiction (June 19, 1908). The facts of the case are sufficiently stated in the judgment of their Lordships. The plaintiff in his plaint alleged that he was a zamindar and had considerable zamindari property in the sub-division of Jamalpur in the district of Mymensingh, and one of his principal zamindari cutcherries was situated in the town of Jamalpur, the headquarters of the sub-division, that the defendant-appellant, a member of His Majesty's Indian Civil Service, was at the time of the matters therein complained of the District Magistrate of Mymensingh, that on the 28th April, 1907, the appellant accompanied by Mr. J. J. Barniville, the then sub-divisional officer of Jamalpur, Mr. M. L. A. Luffman, the then District Superintendent of Police, and other officers, and followed by a number of armed policeman and a number of Mahomedan rowdies carrying *lathies*, wrongfully trespassed into and invaded his (plaintiff's) cutcherry where, under the orders of the appellant and in his presence those who accompanied him forcibly, wantonly and wrongfully broke open and smashed boxes and chests in the cutcherry, searched the contents thereof and in carrying out the search scattered, destroyed and mutilated valuable zamindari papers and documents, and that the appellant acted wrongfully and maliciously, without any reasonable or probable cause, and had no lawful excuse or jurisdiction or authority for so acting. The plaintiff prayed for a decree for Rs. 10,500 as damages.

The appellant, by his written statement, admitted that the search was in fact made, and that it was made by his orders and under his directions, but he pleaded that he was

authorised to make the search under the Code of Criminal Procedure (Act V of 1898), sections 94, 96 and 105, and also under section 165, thereof, or in the alternative under the Indian Arms Act (No. XI of 1871), section 25, and that he was not liable to be sued by virtue of the provisions of the Act for the Protection of Judicial Officers (Act XVIII of 1850). He denied that he acted maliciously or wrongfully, that any unnecessary or unavoidable force was used in making the search, and that any damage was done to any place, box or thing in the cutcherry.

FLETCHER, J., who tried the case, found that the appellant was not actuated by malice or other improper motive in making the search, that the appellant failed to exercise proper supervision and control over the persons under him, conducting the search, and that the search was conducted with unnecessary damage to the plaintiffs' property. He also found that there was no proceedings before the appellant on the 28th April, 1907; and that he was not acting as a "Court" within the meaning of that word in section 94 of the Code of Civil Procedure. The learned Judge, therefore, held that the appellant was not competent to issue a search warrant under section 96, and as he had no such power, he was not authorised to direct the search to be made in his presence under section 105 of the Code. He further found that the search was for the purpose of discovering arms generally and that it was not, nor was it ever intended that it should be made under section 165 of the Code. He, therefore, held that the search was not justified under that section. The appellant admitted that he did not, before causing the search to be made, first record the grounds of his belief under section 25 of the Indian Arms Act, and the learned Judge held that the appellant not having complied with the requirements of the statute could not justify the search under it. He was of opinion that the appellant was not performing any judicial duty in conducting the search, and held that Act XVIII of 1850 did not apply. He came to the conclusion that the search by and under the direction of the appellant was not warranted by law. In the result he awarded the plaintiff Rs. 500 as damages.

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Kishore Roy.

Both parties appealed. The defendants' appeal was dismissed without costs by a majority of the Division Bench, consisting of Sir F. M. MACLEAN, C. J., and HARINGTON and BRETT, JJ. The first two learned Judges affirmed the judgment of FLETCHER, J. while BRETT, J., reversed it. The plaintiff's cross-appeal was also dismissed without costs. For a report of the judgments see

L. O. Clarke v. Brojendra Kishore Roy Chowdhry, [1909] I. L. R., 36 Cal., 433.

The defendant appealed.

Sir Erle Richards, K. C., and *Kenworthy Brown*, for the appellant: Both courts have found that the appellant acted *bona fide* and that there was no improper conduct on his part. The amount of damages is not in dispute. The only question is whether there was a technical trespass. It is submitted that the appellant had powers, which he could have used under the Code of Criminal Procedure (Act V of 1898), and that he was justified in making the search.

If the appellant was competent to issue a search warrant, he had power to direct a search in his presence: section 105 of the Code of Criminal Procedure. The power of the court under section 94 is confined to matters before it and the police officer. But section 96 gives the court increased power whether the matter is before it or not, and it is submitted that the court can act in all cases whether they are before it or not. It is, however, contended that in the present case the court could not act under section 96, because there was no proceeding before it. But that section must apply to cases, where no more has occurred than an investigation by the police, otherwise a reference therein to section 94 is meaningless. The powers given in section 94 are enlarged in certain cases under section 95, and in all cases under section 96. The whole scheme of the Act is not to narrow but to widen those powers.

[Sir JOHN EDGE referred to paragraph 3 of section 96 and observed that the case would come under it.]

It comes under paragraph 1 of it as well.

[Lord ATKINSON: It must be 'any inquiry, trial, or other proceeding under' the Code.]

'Other proceeding' will include an investigation, as under the Code wherever there is an investigation, there is a proceeding, see sections 156 and 157. An explanation of 'inquiry' and 'investigation' is given in section 4. The learned Judges below seem to have forgotten the difference between the English and Indian laws in this respect. In England an investigation is an informal matter, but in India it is a formal matter regulated by the Code.

[Lord ATKINSON : There is no mention of 'court' in section 105.]

That is so. 'Court' and 'magistrate' are interchangeable words under the Code : sections, 32, 33, 34, 35 and 36, and schedule III.

[Lord MACNAGHTEN : There is no definition of 'court.']*

No. Section 6 gives classes of courts, and the appellant was a 'court' under it. 'Court' is there used where anybody has jurisdiction. The appellant had received a report from the police that there had been firing on the previous night and that the fire-arms used were in the plaintiffs' cutcherries. A verbal information is sufficient to give the appellant jurisdiction : see section 190. This information lead him to search. It is impossible to doubt on the facts that the appellant was bound to take some action. He could have tried any of the shooting-cases and had power to issue a warrant to search the cutcherries. He had, therefore, the power to direct a search in his presence under section 105. Reference was also made to section 555, and schedule V, Form VIII.

The search would have been made by Mr. Luffman under section 165. In fact it was made by him, because the appellant was standing outside the cutcherry.

[Lord ATKINSON : The case made in the lower courts was that the appellant himself made the search.]

Yes. It is not denied that the appellant made the search.

[Sir JOHN EDGE : Not as a police officer, but as a magistrate.]

Yes. But he was the head of the police also : The Police Act (Act V of 1851), section 4. He could have ordered Mr. Luffman to make the search under section 165, and the latter was bound to obey the appellants' order.

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[Sir JOHN EDGE: Section 165 gives the police officer power to act on his own initiative.]

That is so. But the appellant believed that as the head of the police he could make the search under that section, and he is, therefore, justified. Reference was also made to sections 154, 156, 157, 159, 160, and 551.

It is submitted that the appellant had power to make the search for Arms under the Indian Arms Act (Act XI of 1878), section 25. But the courts below have held that as he did not first record 'the grounds of his belief' as required by that section, he is not protected thereby. Those words are, however, merely directory and not obligatory. There is no universal rule for the construction of statutes as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience.

The Liverpool Borough Bank v. Turner, [1861] 30 L. J. Ch., N. S., 379, at p. 380, and

Maxwell on the Interpretation of Statutes, 5th edition, pp. 598, 599, 614 and 615.

Recording the grounds under that section is not a ground of jurisdiction. It is a mere formality and the omission to comply with such a formality does not nullify the search. It has been held that persons seizing goods, under a warrant of distress, signed by a justice of the peace who had not taken the statutory oath, are not trespassers :

The Margate Prior Company v. Hannam, [1819] 3 Barmwall and Alderson's Reports, K. B., 266, and

King v. Patteson, [1832] 4 B. and A. Reports, K. B., 9.

There is no provision to show that the record of grounds was meant for the public. Such a record is evidently required for the local Government.

[LORD ATKINSON : Are there any rules ?]

[LORD MACNAGHTEN : What does 'record' mean ?]

It means placing on record. If the words were intended for the protection of the liberty of subject, some form of a record would have been provided by the legislature.

[Sir JOHN EDGE : The magistrate might have to record the grounds of his belief miles away from his court.]

Section 26 of that Act gives the local Government power to make the search without recording any grounds. That again shows that the words in question are not there for the protection of the liberty of the subject.

[Lord ATKINSON : It does not say what is to be recorded and that the person concerned should have access to the record. In the absence of that it seems that it was a matter between the magistrate and his superiors.]

If the words in question are not directory, and if the magistrate has to record his reasons and form his judgment, it is a judicial act, and the appellant is protected under Act XVIII of 1850. His acts were done in the discharge of his judicial duties under the Code of Criminal Procedure, and he is protected under Act XVIII of 1850 whether he had jurisdiction or not. He believed at the time that he had jurisdiction and that is enough to satisfy the requirements of the act :

Seshairyangar v. Raghunatha Row, [1870] 5 M. H. C. R., 345.

Issuing a search warrant is a judicial act :

Hope v. Evered, [1886] L. R., 17 Q. B. D., 338

Lea v. Charrington, [1889] L. R., 23 Q. B. D., 45.

Mahomed Jackariah & Co., v. Ahmed Mahomed, [1887] 1 L. R., [1886] 15 Cal., 104, at p. 141.

[*De Gruyther* : I do not contest this point. The Indian Arms Act and the Code of Criminal Procedure are an answer to the whole case.]

It is submitted that the appeal should be allowed and the suit dismissed.

De Gruyther, K. C., and *J. M. Parikh*, for the respondents : Both courts in India have found that the appellant was acting as an executive officer. There are thus concurrent findings of fact. There was a riot on the 21st April, 1907, and the next day the respondent sent a telegram to the appellant saying that the Mahomedans attacked his cutcherry causing damage and praying for the protection of his property. There was no reply to this telegram until the 29th. But the search was made on the 28th. On the previous evening a Mahomedan was wounded by a revolver shot.

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This affair has no connection with the respondents. It is alleged that the assailants were running away in the direction of the cutcherries. Mr. Luffman arrested four boys, but he did not feel the necessity of searching the cutcherries. As regards the firing of the revolvers from the temple there never was any inquiry, and there were no proceedings in connection with it. As regards the firing at the Mahomedan there was an investigation by Mr. Luffman, who sent his report on the 2nd May. This report, however, states nothing about the search of the cutcherries on the preceding 28th. It is, therefore, obvious that the search was not in connection with this case. Now the question whether the appellant took cognizance of any of the alleged case or not, is a question of fact. Both courts have found that he did not, and the appellant admits in his evidence that he did not.

[Sir JOHN EDGE :—What was he doing?]

He wanted to search the houses of all the Hindus in Jamalpur as an administrative measure. Before searching the respondents' cutcherries he searched several houses and the temple. It was a general search. He was not exercising any judicial function. He might have done so. But the question is whether he did so or not, and the finding is that he did not. Before the appellants' act can be a judicial act it must be shown that he took cognizance of the case under section 190. The wounded Mahomedan made no complaint to the appellant. The police report was not made on or before the 28th April, and even when it was made on the 2nd May, it was not made to the appellant. He cannot take cognizance upon police information. There is no evidence to show that he had personal knowledge of the case. If it is contended that the case comes under section 190, sub-section (1), clause (c), there is no evidence to show that the requirements of section 191 have been complied with. In fact the appellant never took cognizance of any offence.

[Mr. AMEER ALI :—Is cognizance defined?]

No. The expression 'by or before such court' in section 94 means a court which has taken cognizance of an offence under section 190, and is sitting in its judicial

capacity. Section 96 must be read with section 94. The magistrate in section 105 must be acting as a court and seized of inquiry, trial or other proceeding.

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[Sir JOHN EDGE:—What is the use of a District Magistrate, who is responsible for the peace of the district?]

Yes, he is responsible for that, but he must exercise such powers as are given to him by the legislature in the manner prescribed by it. Besides sections 94 and 96 are not for prevention of crimes.

[Sir JOHN EDGE:—You would read 'by or before such court' in section 96.]

Yes.

[Sir JOHN EDGE:—Do you say that no magistrate can issue a search warrant in a case where he proposes to hold an inquiry?]

Not, unless he is seized of the inquiry. If a contrary construction is adopted, the result would be that any Magistrate, even a third class Magistrate, can issue a search warrant in a case, which he cannot try. The issue of a search warrant under section 96 when there is no investigation, inquiry, trial or other proceeding under the Code, as is mentioned in section 94, pending at the time, is illegal, although the Magistrate had received information of the commission of an offence, but had not acted judicially on it, when he issued such warrant :

Rash Behary Lal Mandal v. Emperor [1909] I. L. R., 35 Cal., 1076.

[LORD MACNAGHTEN.—There was no inquiry of any sort in that case, nor was it intended to make any inquiry.]

: The ground of the decision was that the Magistrate was not seized of the case. The Bombay High Court took the same view :

See *In Re Harilal Buch*, [1897] I. L. R., 22 Bom , 949.

[Lord MACNAGHTEN : There again no inquiry was made by the Magistrate.]

The appellant here says, that he was not making any inquiry.

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[Lord MACNAGHTEN : He was making inquiry. I cannot understand what he says.]

He did not take cognizance of the offence under section 190.

[Lord MACNAGHTEN : What do you mean by that ?]

He must be sitting as a judicial officer and acting as a court.

[Lord ATKINSON : Taking cognizance of an offence on 'suspicion' cannot be said to be a judicial act. Taking cognizance must be something more than a judicial act.]

Taking cognizance mean issuing a summons or a warrant after recording on oath the information or complaint. Until a Magistrate does that and is seized of the case, he is not acting as a court in a judicial capacity. If it is otherwise, there is no necessity to bring in Act XVIII of 1850. It is submitted that the appellant was not acting as a 'court' and had no power to issue a search warrant. He had, as a consequence, no power to direct a search in his presence. Reference was also made to sections 4 ('Inquiry' and 'Investigation') 6, 28, 31, 32, 36, 68, 75, 106, 127, 133, 144, 145, 149, 154, 155, 156, 157, 158, 160, 161, 177, 200, 241, 251, schedule III, and schedule V (Form VIII).

As regards the defence under section 155 of the Code, Mr. Lufman was investigating the case of the wounded Mahomedan. But he did not make the search, which was admittedly made by the appellant. Again a search under this section must be for particular arms, but the appellant says that he was searching for arms generally. The predominant feature of the case is that the appellant wanted to ascertain whether there was a considerable storage of arms in Jamalpur. Further, a search under this section is an executive act. The trial Judge has found that the search was not intended to be under this section. On appeal this finding has been affirmed by the C. J. and HARRINGTON, J., With reference to the defence under the Arms Act, BRETT, J. thinks it was an after-thought. The appellant himself says, that he never thought of acting under it. If he had information about arms, as he says he had, he was bound to exercise a judicial decision and record his reasons as required by section 25 of the Act before making

the search. It is admitted that no reasons were recorded. The section affects the liberty of the subject and must be strictly construed. Unless reasons are first recorded, the search is illegal.

[Sir JOHN EDGE : If he seized arms, they would be returned and he would be liable to trespass.]

He would be liable to trespass, but there is nothing to prevent the institution of proper proceedings to keep the arms found. But take another instance, a search is made and nothing is found, as the case is here.

[Lord ATKINSON : Every subject here is subject to a search.]

So he is in India, if the Magistrate 'has reason to believe, and first records the grounds of his belief.

[Lord ATKINSON : If recording is in the interest of the subject, there must be some nature or method of recording, and also rules for inspection of the record by the subject.]

There must be some rules made by the High Court or the local Government. The record would be a public document and inspection would be allowed. The reason, why no reasons are to be recorded under section 26, is that there could be no remedy against the Government. The question really is whether the words in question are for the protection of the subject or not. It is submitted that they are.

If it be held that the appellant acted as a 'court' within the meaning of that word in section 96, his act would be justified and there would be no necessity to appeal to the provisions of Act XVIII of 1850. But, as already pointed out, he did not act as a court and is liable to damages for trespass. If a judge or a magistrate acts beyond his powers and without jurisdiction in any particular case, an action for trespass can be maintained against him :

Mitchell v Foster, [1840] 9 L. J., Duties of Magistrates (N. S.), 95, at p. 96.

Houlden v. Smith ; [1850] 19 L. J. Q. B., (N. S.), 170, at p. 176.

Doswell v. Impey, [1823] 1. L. J. K. B. (O. S.), 99, at p. 100.

[Lord MACNAGHTEN : Even if he *bona fide* believed that he was doing a judicial act in searching?]

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Yes. Mere *bona fide belief* is not sufficient. The act done must be a judicial act :

Sinclair v. Broughton, [1882] L. R., 9 I. A., 152.

[Lord ATKINSON : If the appellant had been informed that the police had been fired at and the people, who fired, were in the cutcherries, could he have issued a search warrant?]

No. He must record the statement on oath and get himself seized of the case.

Sir Erle Richards. K. C., in reply, submitted that an act like that of the appellant must not be construed, as contended in a technical and-narrow sense, as he was both the executive and judicial officer, and it was impossible to say where his executive functions end and his judicial functions begin, and further referred to

Calder v. Halket, [1839] 2 M. I. A., 293, at p. 307.

The judgment of their Lordships was delivered by

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LORD MACNAGHTEN :—The pecuniary amount involved in this appeal is comparatively trifling. But the case is one of grave importance, and their Lordships are compelled to add that, in their opinion, there has been a serious miscarriage of justice in both the courts which dealt with the matter in India.

In April 1907, Mr. Clarke, the appellant, was the District Magistrate of Mymensingh, an extensive district in the province of Bengal. The principal suit, the result of which governs this consolidated appeal, was brought by the first respondent, as plaintiff claiming damages for trespass on the allegation that Mr. Clarke had illegally and wantonly searched his cutcherry, and that Mr. Clarke had not only acted illegally, but that he had acted out of personal malice and ill-will. The suit originally brought in the court of the third Subordinate Judge of Mymensingh was transferred, at the plaintiff's instance, to the High Court, in its extraordinary original civil jurisdiction. It was tried by FLETCHER, J. He found in favour of the plaintiff and gave a decree for Rs. 500, but without costs. Costs were not awarded to the successful plaintiff on account of the charge of personal misconduct which his Lordship held to be unfounded and

grossly improper. Mr. Clarke appealed to the High Court in its appellate jurisdiction. The plaintiff filed cross-objections reiterating his charge of personal misconduct. The court of appeal, consisting of the late Chief Justice and HARRINGTON, J., BRETT, J., (dissenting), dismissed the appeal but without costs.

The result is that a magistrate placed in a very difficult position and called upon to act on a sudden emergency has been adjudged guilty of trespass and subject to a fine though he seems to have acted properly, with courage and good sense, and strictly in accordance with the powers committed to him.

The facts of the case are not really in dispute.

Jamalpur is a sub-division of Mymensingh. The zemindars in that part of the country are Hindus, most of them, apparently, absentees living in Calcutta. The bulk of the population is Mahomedan. For some time before the occurrence which led to this suit, owing, it was said, to the measure known as the partition of Bengal, there had been a good deal of disaffection and excitement in the district, and the relations between the Hindus and the Mahomedans were dangerously strained.

On the 21st of April, 1907, there was a large fair or Mela held at Jamalpur. Some Hindus, apparently at the instance of the servants and agents of the plaintiff and his co-sharers known collectively as the Gouruckpur zemindars, tried to prevent the sale of bideshi or foreign goods. The Mahomedans resented this attempt. There were serious disturbances out of which there sprang up a bitter feeling between the Hindus and the Mahomedans. On the evening of the 27th of April some Hindus dressed or supposed to be dressed in Mahomedan clothes were observed wandering about the town. They were followed by a band of Mahomedans. The Hindus turned on the men following them and fired three or four revolver shots and a Mahomedan was wounded. An uproar followed. Mr. Barniville, the Sub-divisional Magistrate of Jamalpur, and Mr. Luffman, the District Superintendent of Police, who were then in the Dak Bungalow, hastened to the scene of disturbance. They met some Mahomedans carrying

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away the wounded man, and they received information that the persons who had committed this offence had fled in the direction of the cutcherries of the Gouruckpur zemindars. These cutcherries appear to be close together in an open piece of ground. Hard by is a temple of Thakurain Doya Moyee. An excited crowd of Mahomedans was collected there apparently bent on attacking the cutcherries. The Sub-divisional Magistrate and the District Superintendent of Police found 40 or 50 men armed with *lathies*. After they had disarmed them they were told that armed men were concealed in the temple. They went there. They found the doors locked up and were refused admittance. The Sub-divisional Magistrate ordered the persons inside to open the doors assuring them of protection. In response several shots were fired from inside, and a man was wounded slightly. The two officers then withdrew after dispersing the Mahomedan crowd outside.

The Sub-divisional Magistrate wired at once to the Commissioner of the Division and the District Superintendent of Police sent a telegram to Mr. Clarke to the following effect :

" Serious riot just averted, come at once."

Mr. Clarke received this telegram at 2 A. M. on the morning of the 28th of April. He started for Jamalpur by the first train, and arrived there at 10 A. M. On his arrival he found the following telegram from the Commissioner headed " Urgent " :—

" Barniville has wired for available armed police by special train, saying serious disturbance impending. What do you know ? Can you send Gurkhas from Mymensingh to be replaced if required by men from here.—Dacca."

Mr. Clarke, who had spent most of his time after the Mela disturbance between Jamalpur and Mymensingh, and knew the state of feeling in the district, took counsel with the Superintendent of Police and the Sub-divisional Magistrate. From what he heard and from what he knew himself he came to the conclusion that it was his duty to search the cutcherries. And accordingly he did so, accompanied by the Sub-divisional Magistrate, the Police officer,

and a force of police. The plaintiff's cutcherry was found locked. It seems that the jamadar in charge of the building had locked it up, and left at 1 P. M. There was no one on the ground to open the doors. So the doors were forced open. Boxes in the cutcherry were also opened and their contents taken out. The actual search within the building was made by the police, but Mr. Clarke had charge and direction of the whole proceeding. He remained outside.

There was nothing of an incriminating nature found in the cutcherries.

The question and the only question on this appeal is whether Mr. Clarke was authorised by law to make the search. That depends on the provisions of the Code of Criminal Procedure and on nothing else.

It cannot be denied that a serious offence had been committed against the public tranquillity and that under the Indian Penal Code (which defines offences against the public tranquillity and is summarised in Chapter VIII of Schedule II of the Criminal Procedure Code) every member of the unlawful assembly from which the shots proceeded was equally guilty of the offence. Nor can it be disputed that it was the duty of the District Magistrate to enquire into that offence.

Now section 177 of the Code provides that every offence shall ordinarily be enquired into, and tried by a court within the local limits of whose jurisdiction it was committed. Mr. Clarke, by virtue of his superior rank, superseded the Sub-divisional Magistrate of Jamalpur, and properly assumed jurisdiction there.

An enquiry under the Code is a proceeding distinct from a trial. There is no definition of the word "enquiry" in the interpretation clause, section 4. But there is this explanation of the term as used in the Code :—

"(4.) Enquiry includes every enquiry other than a trial conducted under this Code by a Magistrate or Court."

Section 36 is in the following terms :—

"All District Magistrates, Sub-divisional Magistrates, and Magistrates of the first, second, and third classes, have the powers hereinafter respectively conferred upon them and specified in the third schedule. Such powers are called their 'ordinary powers.'"

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Schedule III., referring back to section 36, defines the "ordinary powers" of Provincial Magistrates beginning with Magistrates of the third class. Every Magistrate of a higher class is invested with all the "ordinary powers" of a Magistrate of the class immediately below that to which he belongs, with further powers appertaining to Magistrates of his own grade.

Among the "ordinary powers" of a Magistrate of the third class specified in Schedule III, is :—

"(8.) Power to issue search warrants. Section 96."

In section 96 the following provision occurs :—

"Where the Court considers that the purpose of any enquiry, trial, or other proceeding under this Code will be served by a general search or inspection, it may issue a search warrant."

Then section 105 provides as follows :—

"Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search warrant."

It seems clear from these sections and Schedule III, that Mr. Clarke was authorised by the Code to direct a search of the plaintiffs' cutcherry in his presence if he considered it advisable to do so.

Now the learned Trial Judge disposes of Mr. Clarke's defence in rather a summary manner. Beyond referring to section 105 he does not consider or refer to any one of the sections on which the defence is based, nor does he deal with Schedule III at all. All that the learned Judge says on this part of the case is this :—

"It is obvious in the present case the defendant was not competent to issue a search warrant under the provisions of the Criminal Procedure Code. The defendant was not acting as a Court within the meaning of section 94 of the Criminal Procedure Code, as there was no proceeding pending before him."

On appeal the late C. J. and HARRINGTON, J., took the same view and dealt with the matter much in the same way. After citing section 105 the learned C. J. proceeds as follows :—

"The Magistrate can only act under this section where he is competent to issue a search warrant. That takes us to section 96. That section applies to the issue of a search warrant by the court. Here

the defendant was not acting as a Court and all that section 105 enacts is that instead of the court issuing a search warrant the Magistrate may direct a search to be made in his presence. It is reasonably obvious why this power is given to a Magistrate, but the section does not assist the present defendant."

The opinion of HARINGTON, J., is to the same effect. He says :—

"In my opinion section 96 only authorises the Magistrate to issue a search warrant when sitting as a Court, *i.e.*, when some proceeding under the Code has been initiated before him. And this view is strengthened by the form of the search warrant given in Schedule V, which recites that information has been laid or complaint has been made."

If his Lordship had read to the end of the form in Schedule V. he would have seen that it disposes of his theory altogether. The form contemplates the issue of a search warrant before any proceedings of any kind are initiated and in view of an "enquiry about to be made."

It would seem that the Trial Judge and both the learned Judges who formed the majority of the Court of Appeal were misled by the use of the word "Court" in section 96. For the sake of brevity the Code uses the terms "Court" and "Magistrate" generally if not always as convertible terms. Section 6 headed "Classes of Criminal Courts" enacts that :—

"Besides the High Courts and the Courts constituted under any law under this Code for the time being in force, there shall be five classes of Criminal Courts in British India, namely :—

"I. Courts of Session.

"II. Presidency Magistrates.

"III. Magistrates of the First Class.

"IV. Magistrates of the Second Class

"V. Magistrates of the Third Class."

Section 36 taken in conjunction with Schedule III, places the matter beyond all doubt. The ordinary powers of all Provincial Magistrates are declared to be those "hereinafter conferred upon them and specified in the third schedule." That means : conferred upon them by the Act and specified in the third schedule to the Act. As appears by the schedule the power to issue search warrants is specified among the

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"ordinary powers" of all Provincial Magistrates, but the only section conferring the power is section 96 to which the schedule itself refers.

It seems to their Lordships, therefore, clear that what Mr. Clarke did was warranted by the Code. If that be so, there is an end of the case.

Two other points were discussed by the Trial Judge and the learned Judges of Appeal at much greater length than the ground on which the real defence to the action was based. It seems that the defendant or his advisers not content with relying on the Code of Criminal Procedure, unwisely perhaps prayed in aid section 25 of the Indian Arms Act, 1878, and also Act No. XVIII of 1850, entitled "an Act for the protection of Judicial Officers." The one seems inapplicable; the other in the present case wholly unnecessary. Their Lordships are disposed to agree with the majority of the court of Appeal that Mr. Clarke not having complied with the preliminary condition prescribed by the Arms Act cannot defend his action under that Statute. On the other hand they have no doubt that Mr. Clarke in directing a general search of the plaintiff's cutcherry in view of an enquiry under the Code of Criminal Procedure, was acting in the discharge of his judicial functions, and they think that if it had been necessary, he might have appealed for protection to the Act No. XVIII of 1850.

Their Lordships think that there was no foundation for the suit. Mr. Clarke's action under the circumstances was quite justified. The charge of personal misconduct advanced and reiterated without any shadow of proof deserves the severest reprobation.

Their Lordships will, therefore, humbly advise His Majesty that this appeal ought to be allowed, the order of the Court of Appeal discharged, and the suit dismissed with costs in both courts.

The respondent must pay the costs of the appeal.

The Solicitor, India Office, Solicitor for the appellant.

Downer and Johnson, Solicitors for the respondents.

J. M. P.

Appeal allowed.

JUGAL KISHORE SAHU AND ANOTHER

versus.

KEDAR NATH AND ANOTHER. *

Mortgage—Contribution—Release of part of mortgaged property from mortgage charge—Effect on its liability to contribute.

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While mortgaged property remains in the hands of the mortgagor, the mortgagee may enforce his mortgage against any part of the property, and so long as there are no other persons interested in the property the mortgagee may as between himself and the mortgagor, release any part of the property from the mortgage. But when an estate subject to a mortgage belongs to or subsequently becomes the property of several co-sharers, and one of those persons pays off the debt, he can call upon the other co-sharers to contribute rateably out of their shares to the payment of debt, and when after a mortgage has been made another person purchases or takes in mortgage part of the property, the prior mortgagee cannot even with the consent of the mortgagor release any part of the property from the first mortgage to the prejudice of that person, that is to say, that notwithstanding the release the part released remains liable to contribute rateably to the payment of the mortgage-debt.

SECOND APPEAL from a decree of F. D. Simpson, Esq., District Judge of Gorakhpur, reversing a decree of Munshi Harbandhan Lal, Additional Subordinate Judge.

Suit for sale upon a mortgage.

The facts and arguments appear in the judgment.

J. N. Chaudri and *Satish Chandra Banerji*, for the appellants.

M. L. Agarwala and *Govind Prasad*, for the respondents.

The judgment of the Court was delivered by

CHAMIER, J.—This was a suit upon a mortgage made in January, 1888, in favour of the predecessor of the appellants. The mortgage covered shares in several villages, including a two anna share in a village called Haria. In May, 1895, the mortgagors sold a one anna six pie share in Haria to one Asuda Bibi, leaving with her Rs. 500, part of the purchase money, to be paid to the appellants. That sum was paid to the appellants in July, 1896, and a receipt was given by them,

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which shows that they accepted the money in reduction of the amount due on the mortgage. In 1906, the appellants released the one anna six pie share from the mortgage, stating that they did so in consideration of the payment made to them in 1896. In the present suit instituted in 1910, the appellants claim to be entitled to bring the remainder of the mortgaged property to sale for the recovery of the whole amount remaining due upon the mortgage, after giving credit for the sum of Rs. 500 paid in 1896. The only defence with which we are concerned now is that of the respondents who took a mortgage of the property in September, 1895. They said that the share sold to Asuda Bihi was, roughly speaking, half the mortgaged property in value, and that the appellants were entitled to proceed against the remainder of the mortgaged property for only so much of the mortgage money as was rateably due from it. The Subordinate Judge rejected this defence and decreed the claim in full, but on appeal the District Judge held that the defence was well founded and he gave the appellants a decree for an amount proportionate to the value of the property not released by them. The Subordinate Judge had relied upon the decisions of this Court in *Jai Gobind v. Jas Ram* ⁽¹⁾ and *Sheo Takal v. Sheodan* ⁽²⁾. The District Judge followed the decisions of the Calcutta High Court in *Hari Kissen Bhagat v. Vilait Hossein* ⁽³⁾, and the Madras High Court in *Pounasami Mudaliar v. Srinivasa Naickan* ⁽⁴⁾, and he distinguished the cases on the ground that in them the mortgagee had merely refrained from proceeding against part of the mortgaged property, whereas in the present case the appellant had definitely released part of the property from the mortgage, and he held that the release had the same effect as a purchase of that part by the appellants would have had.

In second appeal the appellants contend that the case is covered by the decisions of this Court mentioned above and also by the decision in *Sheo Prasad v. Behari Lal* ⁽⁵⁾, *Ghafur Hasan Khan v. Muhammad Kifaitullah* ⁽⁶⁾ and *Pirthu Narain Singh v. Amir Singh* ⁽⁷⁾, and that we should

(1) [1898] W. N., p 120

(2) [1905] I. L. R., 28 All., 174.

(3) [1903] I. L. R., 30 Cal., 755.

(4) [1898] I. L. R., 31 Mad., 333.

(5) [1902] I. L. R., 25 All., 79

(6) [1905] I. L. R., 28 All., 19.

(7) [1907] I. L. R., 29 All., 369.

follow those cases in preference to the decisions of the Calcutta and Madras High Courts.

In the Calcutta and Madras cases the mortgagee had released part of the mortgaged property from the mortgage in favour of a person who had purchased that part from the mortgagor, and it was assumed in the Calcutta case and decided in the Madras case that the mortgagee was bound to abate a part of the mortgage money proportionate to the value of the property released and could only recover the balance from the property not released. With the possible exception of the case of *Jai Govind v. Jas Ram* ⁽¹⁾ the cases in this Court which have been referred to do not in any way touch the question which we have to decide. In *Sheo Prasad v. Behari Lal* ⁽²⁾ the mortgagee had asked for and obtained a decree for sale of part only of the mortgaged property. It was held that he was entitled to a decree under section 90 of the Transfer of Property Act after bringing that part to sale. The only defendant to the suit was the mortgagor. In *Ghafur Hasan Khan v. Muhammed Kifayatullah Khan* ⁽³⁾ a mortgagee obtained a decree *nisi* for sale of the whole of the mortgaged property, but took an order absolute for sale of a part only of it. It was held that after bringing that part to sale he was entitled to a decree under section 90 of the Transfer of Property Act. These two cases obviously have no bearing upon the present case. In *Sheo Tahal v. Sheodan Bakhsh* ⁽⁴⁾ part of the mortgaged property was found to belong to persons who had not joined in the mortgage, and the mortgagee withdrew his claim against that part. It was held that a mortgagee suing for sale of part of the mortgaged property was not bound to implead the persons interested in the remainder of the property. In that case there were no puisne mortgagees or subsequent purchasers from the mortgagors. RICHARDS, J., pointed out that the effect of a release by the mortgagee of one of the mortgagors and of his share of the property behind the backs of the other mortgagors was not in question. It seems to us that that case also has no bearing upon the present case. In *Pirbhu Narain Singh v. Ameer Singh* ⁽⁵⁾ a mortgagee obtained a decree for sale of the whole

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(1) [1898] W. N., p. 120.

(2) [1902] I. L. R., 25 All., 79.

(3) [1905] I. L. R., 28 All., 79. (4) [1905] I. L. R., 28 All., 174. F. B

(5) [1907] I. L. R., 29 All., 369.

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of the mortgaged property. After he had brought part of it to sale, it was discovered that the remainder was not saleable, being an occupancy holding. It was held that the mortgagee was entitled nevertheless to a decree under section 90 of the Transfer of Property Act. That case in no way affects the present case. In *Jai Govind v. Jas Ram*(¹) a mortgagee sued his two mortgagors, A and B, and a puisne mortgagee from B, for sale of the whole of the mortgaged property, but at the hearing he asked for a decree against the share of A only. It was held that he was entitled to a decree for the whole of the mortgage money against the share of A. That case is distinguishable from the present case, for in this case the plaintiff mortgagee has definitely released part of the property from the mortgage, whereas in that case the plaintiff merely abstained from asking for relief against part of the property, and if the defendant A redeemed the plaintiff's mortgage, there was nothing to prevent him from claiming contribution from B's share of the property.

While mortgage property remains in the hands of the mortgagor, the mortgagee may enforce his mortgage against any part of the property, and so long as there are no other persons interested in the property, the mortgagee may, as between himself and the mortgagor, release any part of the property from the mortgage. But when an estate subject to a mortgage belongs to or subsequently becomes the property of several co-sharers and one of those persons pays off the debt, he can call upon the other co-sharers to contribute rateably out of their shares to the payment of the debt, and when, after a mortgage has been made, another person purchases or takes in mortgage part of the property, the prior mortgagee cannot even with the consent of the mortgagor, release any part of the property from the first mortgage to the prejudice of that person, that is to say, notwithstanding the release, the part released remains liable to contribute rateably to the payment of the mortgage debt.

The question is whether a mortgagee who releases part of the property from the mortgage without receiving from the releasee his proper share of the mortgage money, can, in a suit against a subsequent purchaser or mortgagee, obtain a decree

(1) [1898] W. N., p. 120.

against the rest of the mortgaged property for the balance of the mortgage money. The Calcutta and Madras High Courts hold that he cannot do so against purchasers of the property. Their view appears to be that the right to contribution between several properties rests upon the principle of subrogation. In the recent case of *Mir Eusuff Ali v. Panchanan* ⁽¹⁾ the Calcutta High Court quote with approval the following statement of the law from an American case ⁽²⁾: "While the whole of the debt is secured by the whole of the land, each parcel of the land as between the different properties is equitably subject to so much of the debt as corresponds to the proportion between its value and the value of all the land, and if its owner should be compelled to redeem the mortgage, he can resort to the others for a contribution, and for that purpose is entitled to the benefit of subrogation to the mortgage title. To release any particular parcel from the mortgage encumbrance is to make as respects that any subrogation impossible. The mortgagee, therefore, releases at his peril if he had notice of the conveyance out of which the equities arise, and if he does so without receiving from the releasee his proper contributory share of the debt, he is still chargeable with the residue of that share in favour of the owners of the remaining parcels." Whether this view is correct or not, it seems clear that a mortgagee cannot release part of the mortgaged property for less than its proportion of the mortgage debt and then sue the mortgagor and a puisne mortgagee for the whole of the balance of the mortgage money. Under section 74 of the Transfer of Property Act a puisne mortgagee is entitled to redeem the next prior mortgagee as soon as the amount due on that mortgage has become payable, and when he has done so, he acquires all the rights and powers of the prior mortgagee as such. In England in a suit by a prior mortgagee against the mortgagor and puisne mortgagees the decree may provide for the exercise by the puisne mortgagees of their successive rights of redemption or for working out the rights of the parties in the event of any puisne mortgagee in front of the mortgagor redeeming the mortgaged property. A form for this purpose is to be found in Seton on Decrees,

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(1) [1910] 15 C. W. N., 800.

(2) *Brooks v. Beuham*, 66 Am. St. Rep., 87.

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Volume, 5th Edition, p. 1641, 6th Edition, p. 1979, and was recommended for use in India by their Lordships of the Privy Council in the case of *Gopi Narain Khanna v. Bansidhar* (1). It has not hitherto been the practice for courts in these Provinces to make such decrees, probably because there was till recently no form prescribed for the purpose, but such a form has been provided in Appendix D to the first schedule to the Code of Civil Procedure, 1908. It is clear, therefore, that a puisne mortgagee may in a suit by a prior mortgagee be given not only the right to redeem the prior mortgage but the right when he has done so to go on and enforce his own and the prior mortgage against the property. The puisne mortgagee might be seriously prejudiced if the prior mortgagee had released part of the property from his mortgage for less than its due proportion of the mortgage money and had nevertheless obtained a decree for the whole of the balance due on the mortgage.

It seems to us that the decisions of the Calcutta and Madras High Courts cited above are correct, and that whether they are correct or not, a first mortgagee cannot be allowed to release part of the mortgaged property for less than its due proportion of the mortgage money and then claim a decree against the mortgagor and a puisne mortgagee for the recovery of the whole of the balances of the mortgage money out of the remainder of the property. It may be suggested that this should be the rule only where the mortgagee has notice of the puisne mortgage when he gives the release. It is unnecessary to consider this, for there is no question that the appellants had notice or must be deemed to have had notice of the puisne mortgages when they gave the release. In our opinion, the decision of the District Judge is correct. We dismiss this appeal with costs.

Appeal dismissed.

(1) [1905] I. L. R., 27 All., 325. P. C.

KRISHNA JIVA TEWARI AND OTHERS

versus

BISHNATH KALWAR AND OTHERS.*

**Evidence Act (No. 1 of 1872), section 69—Document required by law to be attested—Death of attesting witnesses—How to be proved.—Hindu law—Joint family—Parties.*

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MUHAMMAD
RAFIQ, J.
PIGGOTT, J.

The requirements of section 69 of the Evidence Act with reference to proving the attestation of at least one attesting witness when all the attesting witnesses are dead are sufficiently complied with by proof of the handwriting of the scribe and by the fact that some of the attesting witnesses sign by the pen of the scribe.

In cases in which all the adult members of a joint family appear on the record as plaintiffs, the presumption is that they are acting as managers on behalf of themselves and of the minor members of the family who do not join in the suit.

SECOND APPEAL from a decree of Pandit Sri Lal, District Judge of Ghazipur, modifying a decree of Munshi Chhajju Mal, Subordinate Judge.

Suit on foot of a mortgage-deed.

The facts of the case appear from the judgment.

Muhammad Ishaq Khan and *Surendro Nath Sen*, for the appellants.

M. L. Agarwala and *Gobind Prasad*, for the respondents.

The judgment of the Court was delivered by

PIGGOTT, J.—This was a suit for sale upon a mortgage of August the 9th, 1883, brought by the heirs and representatives of original mortgagee against the heirs and representatives of the four mortgagors, together with some subsequent transferees. The Court of first instance decreed the plaintiff's claim, exempting one-fifth share in the property originally mortgaged from the operation of the decree. An appeal by the defendants was dismissed by the District Judge of Ghazipur. Coming to this Court in second appeal, the defendants, or rather six defendants out of a large number, who were impleaded in the court of first instance, have raised substantially five points. For convenience sake, we deal with them in the

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* S. A. No. 1175 of 1911.

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order in which they were raised. The first point taken is that the evidence on the record is not legally sufficient to prove the execution of the deed in suit, regard being had to the provisions of section 59 of the Transfer of Property Act No. IV of 1882 and sections 68 and 69 of the Indian Evidence Act, No. I of 1872. This point was not taken in the court of first instance, and there was nothing in the memorandum of appeal in the lower appellate court to warn the plaintiffs, that objection was being taken to the technical sufficiency of their evidence. The deed in suit purports to be signed by four marginal witnesses, of whom two are literate and two are illiterate. The scribe of the deed has signed his own name at the foot, and has written the names of the two illiterate witnesses. The plaintiffs produced one witness to prove execution of the deed in suit by the mortgagors, who has been accepted as a reliable witness by the courts below, and we must hold that his deposition sufficiently meets the requirements of section 69 of the Evidence Act so far as concerns proof of the signatures of the executants. There is evidence that all the marginal witnesses, and also the scribe, are dead, and we must presume that this evidence has been accepted by the courts below, as it would have been impossible for them, otherwise, to hold the document proved. The plaintiffs have proved the handwriting of the scribe, both as regards his own signature at the foot of the deed, and as regards the signatures of the witnesses, Babu Lal and Sundar Rai, which are in the handwriting of the said scribe. In the case of *Radha Krishen v. Fateh Ali Ram* (1), it was held by this Court that the scribe of a deed who had signed his name at the foot thereof, though not explicitly described as an attesting witness, could give evidence on the same footing as an attesting witness, provided he could prove that the deed was, in fact, executed in his presence. There is a fair presumption to be drawn from the fact that the signatures of two of the attesting witnesses in this case were written by the pen of the scribe that the said scribe was present at the execution of the deed. We are of opinion, therefore, that the requirements of section 69 of the Indian Evidence Act with reference to proving the attestation of at least one attesting witness when all the attesting witnesses

(1) [1898] I. L. R., 20 All., 532.

are dead, have been sufficiently complied with in this case by proof of the handwriting of the scribe and by the fact that two of the attesting witnesses appear to have signed by the pen of the said scribe.

The second point taken is the most substantial point in this case. The bond in suit was executed by four brothers, Umrao, Sheoperson, Hari and Gopal. It is an admitted fact that at the date of the execution these four were members of a joint undivided Hindu family. It is, also, admitted that there was living at that time a fifth brother, named Bhondu, who was, also, a member of the joint Hindu family. Some evidence has been offered, on behalf of the plaintiffs, to prove that Bhondu would have been asked to join in the execution of the deed, but for the accident that he was lying ill at the time. The contention for the defendants-appellants is that four of the brothers had no right to hypothecate any portion of the joint family property without the authority of the fifth, and that, in consequence of Bhondu's not having joined in the execution of this deed, the mortgage in suit is not binding even as against the interests of the four mortgagors in the joint family property. There are two circumstances in the case which appear to us decisive. In the first place, the deed in suit was executed for legal necessity, namely, to pay off an antecedent debt due from the father of the four executants, a debt for the payment of which the four mortgagors and their brother, Bhondu, were all liable because of their pious duty as Hindu sons. In the second place, it is to be noticed that the suit as now brought is not against a joint family. The joint family has been broken up, and the defendants, who are the legal representatives of the original mortgagors, form a number of separate groups, the members of which are joint amongst themselves but separate from the rest. Without any general discussion of the questions of law that have been argued before us, we are content to say that under these circumstances we are satisfied that the mortgage in suit is enforceable at least against the shares of the four executants of the mortgage deed. The question whether the courts below were right in exempting Bhondu's one-fifth share is not before us, as the plaintiffs never challenged the correctness of the decree of the court on this point.

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It appears that one of the groups of defendants before us included a father and son, and that one Ram Prasad, a minor son of the latter defendant, was not impleaded in the suit at all. It is contended on behalf of the appellants that this omission is fatal to the entire suit, it being conceded that Ram Prasad cannot now be added as a defendant, the period of limitation for a suit against him having expired. On the principles laid down by the latest rulings of this Court in *Hori Lal v. Munman Kunwar* ⁽¹⁾ and *Nathu Lal and others v. Lala and others* ⁽²⁾, it appears to us that the courts below were right in holding that the minor Ram Prasad was sufficiently represented in the suit by his father and grandfather. We would refer to the remarks of Mr. Justice CHAMIER, on page 417 of the report in the second of the rulings above referred to. In cases in which all the adult members of a family appeared on the record as plaintiffs, it was held that this alone justified the presumption that they were acting as managers on behalf of themselves and of the minor members of their family who had not joined in the suit. We think the same principle applies to the case of defendants.

The fourth point taken refers to a payment of Rs. 125, admitted in the plaint. It is sufficiently met by the fact that the interest claimed in the plaint is simple and not compound, and there is nothing in the pleadings or evidence to suggest that this payment of Rs. 125 could or ought to have been credited to principal.

The fifth point is the last point taken on behalf of the appellants, and it refers to an issue raised in the written statement of Baijnath Rai, defendant No. 23. The scanty information available on the record makes it difficult for us to understand the precise circumstances on which this plea is based. Baijnath Rai was impleaded in the plaint simply as a subsequent mortgagee, no details being given of his mortgage. In his written statement this defendant pleaded that a portion of the property in suit had been hypothecated to one Bija or Bijai Rai under a deed of August the 1st, 1886. He added that the said Bijai Rai had brought a suit upon his mortgage in the year 1898, implead-

(1) [1912] 9 A. L. J. R., 812.

(2) [1912] 9 A. L. J. R., 410.

ing Raja Ram, whom he described as the ancestor of the plaintiffs, as a mortgagee subsequent to himself. The contention is that, as the said Raja Ram made no defence to that suit, the plaintiffs are estopped in the present suit from claiming priority for their mortgage as against that in favour of Bijai Rai. The courts below have contented themselves with remarking that, even if this plea were effective as against Raja Ram, there was nothing to show that Raja Ram represented all the present plaintiffs in that suit of 1898, and that there were still remaining a number of plaintiffs entitled to maintain the suit as brought. So far as we can gather from the materials on the record, this finding appears to be correct. There does not seem to be anything on the record to show how the defendant, Baijnath Rai, comes to have any interest in the mortgage in favour of Bijai Rai, or that he was impleaded as defendant because of this mortgage of August 1st, 1886. Again, the decree of September the 9th, 1898, which is the only evidence on the record on this point, merely shows that Raja Ram was impleaded as son and heir of Amrit Lal, and that the suit brought by the plaintiff, Bijai Rai, was decreed. It does not even show in what capacity Raja Ram was impleaded, or what interest he had in the subject matter of the suit. It is incumbent on a defendant who raises the plea of *res judicata* to lay before the court adequate materials for a full and proper appreciation of that plea and a proper decision thereon. This has, certainly, not been done in the present case. For these reasons, we overrule all the objections taken on behalf of the appellants and dismiss the appeal with costs.

Appeal dismissed.

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RICHARDS, C. J.
TUDBALL, J.

ISHRI PERSHAD

versus

GOPI NATH AND OTHERS.*

Registration Act (No. 1 of 1877), section 50—Priority between registered and unregistered deeds—Same property.

R executed an unregistered mortgage deed in favour of *G* on August 21, 1894. *R* executed another unregistered mortgage-deed in favour of *B* in respect of the same property on May 30, 1896. *B* brought a suit for sale on his mortgage and got a decree. In execution of his own decree he purchased the property. His son sold the property to *B. K.*, and the latter's heir sold it to *I. B. K.'s* heir, however, sold the full right of ownership in the property, and the sale-deed in favour of *I* was registered. In a suit for sale on his mortgage by *G*, held that *I* had priority over *G's* unregistered mortgage.

Subhag Chand v. Bhai Chand, [1882] I. L. R., 6 Bom. 193, distinguished.

APPEAL under section 10 of the Letters Patent against the judgment of Mr. Justice BANERJI, confirming the decree of B. J. Dalal, Esq. I. C. S., District Judge of Shahjahanpur, who reversed a decree of Babu Gopal Das Mukerji, Munsif of Bisauli.

Shib Lal and others executed a simple mortgage on August 21, 1894, in favour of the present plaintiff, by means of an unregistered deed. Subsequent to that date the same mortgagors executed another simple mortgage by means of an unregistered deed on May 30, 1896, in favour of Bindraban. Bindraban sued upon his mortgage, and in execution of his mortgage decree purchased the property. He, on March 10, 1910, by an *unregistered* deed of sale sold the property to Bal Kishen, and Bal Kishen subsequently by a *registered deed* of sale sold the property to Ishri Prasad, the defendant. The deed of sale purported to transfer the property free of all encumbrance. The plaintiff brought the present suit to enforce his mortgage of August 21, 1894, and impleaded Ishri Prasad as defendant. Ishri Prasad pleaded that because he had purchased the property from Bal Kishen by a registered deed of sale, he was entitled to priority under section

* L. P. A. No. 34 of 1912.

50 of the Registration Act. The lower appellate court held that he was not entitled to priority and decreed the plaintiff's claim. On second appeal the decree was confirmed by

BANERJI, J.—In my judgment there is no force in this appeal. The suit which has given rise to it was brought by the respondents for sale upon a mortgage, dated the 21st of August, 1894, for Rs. 99, executed by Ram Bakhsh and others. On the 30th of May, 1896, the same mortgagors mortgaged the same property to one Bindraban. Both the mortgage deeds were unregistered. Bindraban brought a suit for sale upon his own mortgage, and in execution of the decree obtained by him sold the mortgaged property and bought it himself. His son sold it to one Bal Kishen, whose heir sold it to Ishri Prasad, defendant, on the 7th of April, 1910. This sale-deed was registered. Ishri Prasad claims that by reason of his sale-deed being registered, he has priority over the plaintiff by virtue of the provisions of section 50 of the Registration Act. In my opinion the lower appellate court has rightly overruled his plea. The mortgage in favour of Bindraban was a mortgage of such rights as existed in the mortgagor after the execution of the prior mortgage in favour of the plaintiffs. It is these rights which Bindraban brought to sale in execution of his decree, and it is these rights only which passed to him under his auction purchase. Ishri Prasad under his purchase has acquired only such rights as Bindraban and his successors in title possessed. Therefore Ishri Prasad has only acquired the rights of the mortgagors which existed in them after the execution of the mortgage deed in favour of the plaintiffs, that is to say, the equity of redemption of the mortgagors. That being so, Ishri Prasad cannot claim that he has acquired the property mortgaged to the plaintiffs, that is to say, the entire property, and that he can ignore the mortgage in the plaintiff's favour. His sale-deed and the mortgage of the plaintiffs do not in reality cover the same property, and therefore section 50 cannot apply to a case like this. The principle of the decision of the Bombay High Court in *Sobhagchand Gulabchand v. Bhaichand* (1), does not apply to the present case. I dismiss the appeal with costs.

(1) [1882] I. L. R., 6 Bom., 193.

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The defendant appealed under the Letters Patent.

Sital Pershad Ghosh, for the appellant.

The defendant is entitled to priority under section 50 of the Registration Act because his document refers to the same property over which the plaintiff held a mortgage. The plaintiff's mortgage deed being unregistered would be postponed to the defendant's title deed which is a registered document. It is immaterial to enquire into the title of Bal Kishen or of his predecessor in title because the legislature has clearly enacted that a subsequent registered document will have priority over a prior unregistered document dealing with the same property. To take a simple illustration :—If A makes a mortgage by an unregistered deed and then makes a mortgage of the same property by a registered deed, strictly speaking the interest conveyed by the second mortgage would be only the equity of redemption which was left, but yet it cannot be argued that section 50 would not help the subsequent mortgagee. His document by virtue of its being registered will have priority over the first unregistered deed. It makes absolutely no difference in principle if there is not a common transferor in both cases. The policy of the Registration Act is to place a premium on registration, and if parties fail to have recourse to the provisions of that Act, they cannot complain if they afterwards find that their title deed has to be postponed to others which though subsequent in date have been registered.

Peary Lal Banerji (for *Durga Charan Banerji*), for the respondent.

It could not have been the intention of the legislature in enacting section 50 to do away with all enquiry into the title which could be conveyed by means of a registered-deed. In the present instance it is quite clear that the defendant's original predecessor in title, Bindraban, could only have acquired at the auction sale the right, title, and interest of the judgment-debtor at the date of the sale, *i. e.*, the property subject to the plaintiff's prior mortgage. His title could not be enlarged by any subsequent act of his. His transferee, Bal Kishen, therefore, acquired by the sale in his favour, the same rights as Bindraban had acquired at the auction sale, and Balkishen in his turn, could only have transferred the interest which he had

himself acquired. He could not by simply registering his deed of transfer amplify the *quantum* of his estate, and the defendant, therefore, could not possibly be deemed to have acquired any larger interest than Bindraban originally had, and that interest was admittedly inferior to the plaintiff's title as it was the purchase of a subordinate interest subject to the plaintiff's prior interest. It is an elementary principle of law that no one can give a better title than he himself has and the analogy suggested by the appellant cannot be pushed so far as to include a case like the present. Section 50 will only apply where the two deeds are antagonistic to each other, in other words, where it is impossible to give effect to one without destroying the other.

He relied on

Sobhagchand Gulabchand v. Bhaichand, [1882] 1 L. R., 6 Bom, 193,
F. B.

Sital Prasad Ghosh, not heard in reply.

The judgment of the Court was delivered by

TUDBALL, J.—The facts of this case are as follows :—

Ram Baksh and others mortgaged certain property to the present respondents on 21st August, 1894. On 30th May, 1896, they mortgaged the same property to Bindraban. Both mortgage deeds were unregistered. Bindraban brought a suit for sale on his mortgage and purchased the property himself in execution of his decree :

His son sold the property to Bal Kishan. The latter's heir sold it to Ishri Prasad, the present appellant.

It must be clearly noted here, that though Bindraban purchased at the auction sale the right, title, and interest of his mortgagors, what was sold to Ishri Prasad by the heir of Bal Kishan was the full right of ownership and not the mere right, title and interest of the transferor. An examination of Ishri Prasad's sale-deed makes this clear. That sale deed was registered. Ishri Prasad's vendor was the full owner of the mortgage of 21st August, 1894, was out of the way, but we may assume for the purposes of this appeal that the vendor legally owned only the property subject to that mortgage ; what he purported to sell, was the full right of ownership. In this he may or may not have

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acted dishonestly, but there is nothing to show that Ishri Prasad had any notice whatever of the pre-existing unregistered mortgage. The prior mortgagee brought the present suit for sale out of which this appeal has arisen.

In defence, Ishri Prasad pleaded section 50 of the Registration Act and urged that his registered sale-deed took effect as regards the property comprised therein against the unregistered mortgage deed of the plaintiff which related to the same property. The court of first instance upheld this plea and dismissed the suit. The lower appellate court reversed that decision and decreed the suit. On second appeal to this Court, the learned Judge who heard the appeal, confirmed the decree of the court below, hence this appeal under the Letters Patent.

It is urged before us, and with great force, that our learned brother has taken a wrong view of the facts of the case. The argument in his judgment is that, what was mortgaged to Bindraban, was the equity of redemption; and this is what Bindraban purchased, and what his son sold to Balkishan, and what Balkishan's heir transferred to Ishri Prasad; and as the latter only purchased the equity of redemption, the two deeds do not cover the same property and, therefore, section 50 of the Act does not apply. Reliance was placed on the decision in *Subhagchand Gulabchand v. Bhaichand*.⁽¹⁾ The error in the above is patent on an examination of the sale-deed in favour of Ishri Prasad. That deed does not purport to transfer only the right, title and interest of the transferor, but is, in plain terms, a sale, out and out, of the full right of ownership in the property. The mortgage in the present suit is a mortgage of the same property.

The two deeds, therefore, *do* cover the same property and section 50 of the Act does apply.

There can be no question that if the original mortgagors had executed the two deeds now in conflict, the sale-deed being registered would take effect against the unregistered mortgage deed, even though, *after the execution of the latter*, the mortgagors would have been the owners of only the equity of redemption.

(1) [1882] I. L. R., 6 Bom., 193.

The rights of the mortgagors were acquired by the appellant's vendor, but he sold to the appellant not the equity of redemption but the property itself. In principle there is no difference.

We would call attention to the remarks of MELVILLE, J., in I. L. R., 6 Bom., 193, to be found at page 208, and which were quoted with approval by AIKMAN, J., in *Baldeo Prasad v. Baldeo*. (1)

In the present case the "estate" was covered by both the deeds in suit. The case is also covered by the un-reported decision in *Ram Lal & Co., v. Thakur Bachcha Singh & Co.*, S. A. No. 1148 of 1911, decided on 13th June, 1912 (2).

We allow the appeal, set aside the decree of this Court and restore that of the court of first instance, with costs in all courts.

A. C. M.

Appeal allowed.

(1) [1901] W. N., p. 112.

(2) [1912] Since reported. 10 A. L. J. R., 114.

SULTAN AHMAD AND ANOTHER

versus

WALIULLAH AND OTHERS.*

Easements Act (V of 1882), sections 15, 47—Right of way—Prescriptive right.

The fifth paragraph of section 15 of the Easements Act, which applies to both continuous and discontinuous easements, seems to render it impossible to acquire a statutory prescriptive title to an easement unless and until the claim thereto has been contested in a suit.

SECOND APPEAL from a decree of Pandit Ram Autar Pande, District Judge of Azamgarh, modifying a decree of Babu Lakshmi Narain Tandon, Additional Munsif.

Suit for injunction.

The plaintiffs, proprietors of plot No. 1640, sued the defendants for a perpetual injunction restraining them from interfering with the plaintiff's constructions. The defendants

* S. A. 870 of 1911.

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pleaded that they had acquired a prescriptive right of way over plot 1640 to pass from their dwelling house, which was to the south of the plot, to their factory which was to the north of the plot. The court of first instance held that the defendants had been using an old pathway over plot 1640, but that had been abandoned 16 or 17 years ago by reason of a change in the frontage of the defendants' dwelling house, and that a prescriptive right of way had not been acquired by the user of the new way since the change aforesaid. It, therefore, decreed the suit. On appeal by the defendants, the lower appellate court held that the new pathway was simply a deviation from the old pathway, and that the defendant had acquired a prescriptive right of easement.

The plaintiffs appealed.

When the appeal first came on for hearing, CHAMIER, J., by his order, dated 11th April, 1912, called for further findings. The order was as follows :—

CHAMIER, J.—This was a suit by the appellants to obtain a perpetual injunction restraining the respondents from passing across plot No. 1640, which is the property of the plaintiffs, and also restraining them from obstructing the appellants in the building of a wall across the same plot. The respondents' case was that they had originally two distinct rights of way across No. 1640 from north to south. Both the courts below have decided that although it is proved that the respondents have been using the eastern way for many years, they have not used it for the period required for the establishment of an easement. Nothing more need be said about the eastern way. With regard to the western way the Munsif held that it was proved that the defendants for many years used that way in passing from their houses to their factory and that they gave it up in favour of a new and more direct way when they built their new *sanana* house. The Munsif was of opinion that the evidence was strong to show that the western way was used by the plaintiffs up to within 16 or 17 years of the present suit, and that about that time the defendants of their own accord abandoned the old way and began to use a different way. He rejected the contention of the defendants that the deviation was due to

a construction of a wall caused by the plaintiffs and he declined to hold that the deviation took place ten years before the suit. He held that the defendants had not used the old way for 16 or 17 years before giving it up, and that the new way had been enjoyed for a sufficiently long period.

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On appeal the District Judge, after agreeing with the Munsif regarding the eastern way, said that it was satisfactorily proved that the defendants had enjoyed the western way over plot No. 1640 for many years. He agreed with the Munsif that the defendants had built a new house 16 or 17 years before the suit, but he found it proved that about 10 years before the suit the plaintiffs had built an enclosure, and that it was then that they had begun to use a somewhat different way over the plaintiffs' property. He held that it was not proved that the defendants had abandoned the old way, but that it was a case of a deviation due to the erection of the plaintiffs' enclosure. He allowed the appeal in part and dismissed the plaintiffs' suit as regards a way which he marked on the plan as A, B, C, D.

In second appeal it is contended that there is no definite finding by the lower appellate court, and that in fact there is no evidence on which there could have been a definite finding that the defendants had enjoyed the old western right of way over plot No. 1640 as an easement and as of right without interruption for twenty years before the deviation took place. It seems probable that the District Judge intended to find on this point in favour of the defendants, but I am bound to hold that there is no definite finding. The case must, therefore, go back for a definite finding, and as the attention of the parties was not drawn in the court of first instance to the importance of proving or disproving the existence of an easement previous to the deviation, I do not think that I should prevent the parties from giving any further evidence that may be available. I direct that the record may be returned to the lower appellate court for definite findings on the following issues :—

(1) Whether the defendants acquired an easement in respect of what is called the old western way over No. 1640.

(2) Whether there was a deviation from that way.

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(3) Whether the deviation was caused by the buildings erected by the plaintiffs, and, if so, when those buildings were erected.

Further evidence may be admitted. On return of the findings ten days will be allowed for objections.

The findings of the court below were as follows :—

The facts of the case have been explained with clearness in the order of the Hon'ble High Court, so they need not be repeated here. The issues remitted to this court for decision are :—

(1) Whether the defendants acquired an easement in respect of what is called the old western way over plot No 1640 ?

(2) Whether there was a deviation from that way ? and

(3) Whether the deviation was caused by the buildings erected by the plaintiffs, and, if so, when these buildings were erected ?

I hold that the defendants did acquire an easement in respect of the old western way. Their *sanana* house is to the south of plot No. 1640, which was formerly *parti land* and their *baithka*, where the men congregate, is to the north of that land. In the very nature of things an Indian could never resist the temptation of a short cut over an open space of land belonging to another person. The plan prepared in the year 1875 (paper 30 C), indicates that a pathway did exist in plot No. 1640.

Finding (2) :—

Undoubtedly the witnesses of the defendants are prejudiced in their favour, but they testify to a natural course of events, and I am prepared to believe them so far as they speak of the defendants' making use of a pathway over the *parti* land to the west from the defendants' western door to their *baithka*.

(2)—It is admitted by both parties that there was a deviation from that way, and I hold accordingly.

(3)—I do not believe that the deviation was caused by the plaintiff's building over the path to the west. The defendants had left that old path some years before the building was constructed and adopted the path to the east

going directly to the *bathka* from the northern door. Sixteen or seventeen years ago, the defendants opened the door to the north of their house after building the northern portion of brick. Since that time, the door for ingress and egress to the house has been the northern door and not the old western door. The dispute between the parties is whether the opening to the west continued to be a door or turned into a window sixteen or seventeen years ago. The matter is of no importance because it is clear that the western door ceased from that time to be the principal door of the house and was not made use of for the purposes of ingress and egress by the inhabitants. This is clearly indicated by a copy of an award, dated 23rd December, 1903, filed to-day, on behalf of the plaintiffs. The arbitrator has stated therein that this western opening was no longer used at the time by the defendants as a means of communication with the public road. There is another point: the parties are at such enmity and are so keen on litigation that if the western path had existed six or seven years ago, when the plaintiffs constructed their enclosure, the defendants would never have allowed such an opportunity for a suit to pass by without taking advantage of it. The only reason why the defendants did not rush to court at the time was that they had given up the western road and had started using a different road to the east over the *parti* land. The defendants' witnesses are very confused about the exact situation of this old western path. Some put it as far as the south-western extremity of the new building and some as near as the south-eastern extremity. Some give it as their opinion that the path was situated between those two points. It is clear to me that the path existed at a time of which the witnesses have no clear recollection. This would not have happened if the path had ceased to exist only six or seven years ago when the plaintiffs constructed the new enclosure. The want of recollection is due to the path having been given up over fifteen years ago when the defendants changed the situation of the front door of their house. The parties to the suit form two factions in the village whose only amusement in life is to have some litigation on in Civil Courts. The witnesses they bring to court are well tutored partisans

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who help the parties as whole-heartedly with false testimony as they themselves hope to be helped by these parties in other litigations in which the witnesses are concerned. In such a state of affairs a court is more likely to arrive at the truth by the guide of circumstances and probabilities than by reliance on the uttered word. I hold that the deviation was not caused by the plaintiff's buildings that the defendants gave up the western path voluntarily some years prior to the construction of the buildings, and that only the eastern path has been in use for the last fifteen years.

At the resumed hearing.

Pearay Lal Banerji, for the appellants, contended that the mere fact that the defendants had been using a pathway for more than 20 years at some period of time was not sufficient to give them a prescriptive right of way. The period of twenty years which the statute required was not a period "in gross" but a period ending within two years next before the institution of the suit. Under section 15 of the Easement Act no absolute right was obtained by twenty years' user but merely an inchoate right, and the owner of the dominant tenement after twenty years' user was in a position to avail himself of the act if his claim was brought into question. He cited

Colls v. The Home and Colonial Store, [1904] Ap. Cases, 189.

Hyman v. Van Den Bergh, [1908] 1 Ch. D., 167.

A right of way is a right of passage over a particular line from a *terminus a quo* to a *terminus ad quem* which are fixed. (See Peacock on Easement, p. 442). The old passage having been abandoned 16 or 17 years ago and a new passage not having been used sufficiently long enough, no prescriptive right of way had been acquired.

Ahmed Kareem, for the respondents, contended that a right of way was a discontinuous easement. Under section 47 of the Easements Act, as there was no cessation of user for over twenty years, the right was not extinguished.

Pearay Lal Banerji, not called on to reply.

The following judgment was delivered by

Chamier, J.

CHAMIER, J.—The finding on the first and second issues remitted by my order of April 11th is in the affirmative, and the finding on the third issue is in the negative.

The meaning of the findings on the first and third issues is that the defendants enjoyed the old western right of way over plot No. 1640 as an easement and as of right for more than twenty years up to within 16 or 17 years of this suit and then abandoned it, or at all events the southern part of it in order to go direct to a new door opened by them.

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It seems to me that the result of these findings is that the defence fails. The fifth paragraph of section 15 of the Easements Act seems to render it impossible to acquire a statutory prescriptive title to an easement unless and until the claim thereto has been contested in a suit. The same has been held with reference to sections 3 and 4 of the Prescription Act, 1832 (see the judgment of Lord MACNAGHTEN in *Colls v. Home and Colonial Stores*(¹) and *Hyman v. Van Den Bergh* (²)). The circumstance that section 3 of the Prescription Act relates to continuous easements only does not appear to affect the matter. The fifth paragraph of section 15 of the Indian Easements Act applies to both continuous and discontinuous easements.

There is no ground for presuming a lost *grant* of the right of way. Nothing of the kind has been suggested. The defendants have not claimed to be entitled to an easement except under the Easements Act.

The result is that the appeal is allowed, the decree of the lower appellate court is set aside and the decree of the Munsif is restored with costs throughout.

A. C. M.

Appeal allowed.

(1) [1904] L. R., A. C., 179, at p. 189.

(2) [1908] L. R., 1 Ch., 167.

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CHAMIER, J.
PIGGOTT, J.

COLLECTOR OF GHAZIPUR

versus

BALBHADDAR SINGH AND OTHERS.*

U. P. Court of Wards Act (III of 1899, Local), sections 16, 17, 18, 20—Bengal Court of Wards Act (IX of 1879), sections 10A, 10B.—Interpretation of Statutes—Discretion—Non-production of documents before Collector upon notice—Objection not taken in proper time.

Sections 16, 17, 18 and 20 of the U. P. Court of Wards Act considered and compared with sections 10A and 10B of the Bengal Court of Wards Act. *Barrow v. Gaya Prasad*, 9 A. L. J. R, 558, distinguished.

Provisions of law which operate so as to impose a penalty or disability upon a person who fails to comply with must be strictly interpreted.

The provisions of the U. P. Court of Wards Act lay upon creditors the obligation to produce detailed statements of claim, accompanied by all necessary documents, within the period limited by the notice under section 16, where a claim is not so notified, the law leaves no discretion to the court and under section 18 no interest can be allowed from the date of the expiry of the period prescribed in section 16.

In the absence of general orders issued by the Board of Revenue or any special orders, the Collector is under no obligation to do anything more than get the notice under section 16 published in English and in the Vernacular in the Provincial Gazette.

It would be contrary to all sound principles of interpretation to apply the proviso embodied in section 17, clause 2, to the subsequent sections 18 and 20.

Where, however, the admission of documents of title in evidence was not challenged at the proper time, and, strictly speaking, was not challenged at all, and the court below had no real opportunity at the late stage, when the objection was raised, to turn round on the plaintiffs and call upon them to explain the non-production of their mortgage-deeds before the Collector, *held* that to exclude the documents altogether from the record would be to exact an extreme penalty for a piece of neglect due to mere ignorance. The provisions of section 20 leave the court a discretion to admit the plaintiff's documents of title in evidence, despite their non-production before the Collector.

FIRST APPEAL from a decree of Munshi Chhajju Mal, Subordinate Judge of Ghazipur.

Suit for sale upon mortgage.

* F. A. No. 256 of 1910.

The court below decreed the suit.

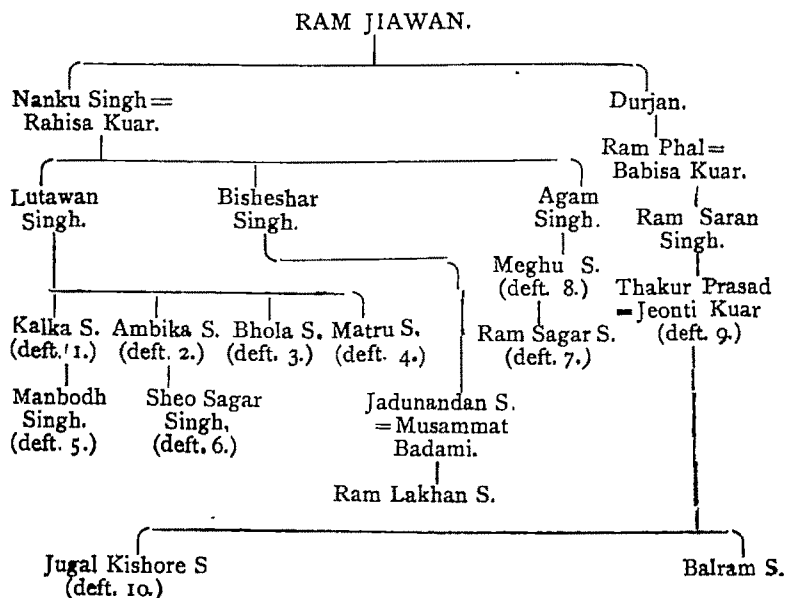
Defendant appealed.

A. E. Ryves and *W. Wallach*, for the appellant.

Sundar Lal and *Gobind Prasad*, for the respondents.

The judgment of the Court was delivered by

- PIGGOTT, J.—This appeal arises out of a suit by respondents 1 and 2 upon three mortgage-deeds executed in their favour, or in favour of their father, in March, 1888, and August, 1892, by Ram Saran Singh, Lutawan Singh, Bisheshar Singh and Meghu Singh. The following pedigree shows the relationship between the mortgagors and other persons who will be referred to in this judgment :—



- The defendants described as defendant, first party, in the court below, are the living descendants of Nanku Singh and Ram Saran Singh. The defendants, second party, are lessees whose exact position need not be explained. The defendant, third party, is the Collector of Ghazipur, representing the estate of Dulhin Ram Kuar who purchased the mortgaged property in December, 1902, from Ram Saran Singh and his descendants and from the descendants of Nanku Singh. The defence of the Collector of Ghazipur was that the property belonged to Nanku Singh and Ram Phal Singh ; that Nanku's

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widow as guardian of her children, sold their share in the property in December, 1850, to Ram Phal Singh; that Ram Phal Singh died without issue, leaving his widow, Babisa Kuar, who died in September, 1901; that the Ram Saran Singh shown in the pedigree was not the son of Ram Phal, nephew of Nanku, but was the son of a Ram Phal whose father's name was Ghore Patari Rai; that during the lifetime of Babisa Kuar, the descendants of Nanku, who were her husband's reversionary heirs, had no rights in the property, therefore the mortgages in suit were invalid; and lastly, that Dulhin Ram Kuar purchased the property from the persons who became entitled to the property on the death of Babisa Kuar, whether under a will said to have been executed by her or as the reversionary heirs of her husband.

It appears that Babisa Kuar obtained mutation of names in her favour upon the death of her husband. But in 1884 Ram Saran and the sons of Nanku got their names entered in the record. Babisa Kuar, in May, 1894, obtained a decree against them declaring that they had no title. The plaintiffs alleged that the proceedings of 1894 were collusive. The Subordinate Judge has found that those proceedings were collusive; that Ram Saran was the son of Ram Phal, nephew of Nanku, and that the mortgages in suit are binding on the property in the hands of the Collector.

At a late stage of the suit, under circumstances which will be detailed below, it was contended on behalf of the Collector that the suit was not maintainable inasmuch as the plaintiffs had failed to notify their claim to the Collector when the Court of Wards took charge of the estate of Dulhin Ram Kuar in 1903, and had failed at that time to produce before the Collector the deeds on which this suit is based. The Subordinate Judge rejected this plea.

In appeal it is contended that the decision of the court below is erroneous on both points.

We think that the decision of the court below on the question of fact is clearly right. It may be that there was in the village a Ram Phal, who was the son of Ghore Patare Rai. But there can be no doubt that Ram Saran, father of defendant 9 and grandfather of defendant 10, was the son

of Ram Phal, nephew of Nanku Singh. Mutation of names was, no doubt, made in favour of Babisa Kuar upon the death of Ram Phal. But that would not unnaturally have been done if Ram Saran was then a minor. Ram Saran and the descendants of Nanku managed to get their names on the records in 1884. Ram Saran joined with the descendants of Nanku in mortgaging the property in 1878 to Raja Shambhu Narain Singh, and Babisa Kuar made a will in November, 1894, whereby she purported to leave half the property to Balram Singh, grandson of Ram Saran. If Ram Saran, who was admittedly the father of defendant No. 9 and grandfather of defendant No. 10 and of Balram Singh, was, as the defendants suggest, merely a dishonest servant of Babisa Kuar, it is inconceivable that she would have left half her property to Ram Saran's grandson very soon after she had litigation with Ram Saran. The association of Ram Saran with the descendants of Nanku on several occasions when the property was being dealt with, is inexplicable except on the ground that he was related to them. It came out in the cross-examination of some of the defendants' witnesses that Ram Saran's house was actually next door to that of Lutawan Singh, the eldest son of Nanku; whereas the house of Ghore Patore Rai was some distance away. It seems probable that Ram Saran's house is part of the old family house. After a full consideration of the documentary evidence, we have no doubt that the evidence of the plaintiffs' witnesses is true. These witnesses say that Ram Saran, father of defendant No. 9, was the son of Ram Phal by his wife Babisa Kuar. Much stress was laid by the defendants upon a suit brought by Babisa Kuar in 1898 against a Receiver, who had been appointed in execution of a decree obtained by Raja Shambhu Narain Singh upon a mortgage made in his favour in August, 1878, by Ram Saran and the descendants of Nanku. In that suit Babisa Kuar obtained a declaration that the mortgage of August 24th, 1878, was not binding upon her. The defendants have also relied strongly upon a statement made by Babisa Kuar in a will made by her in November, 1894, to the effect that she had no son. We regard that statement as being of a piece with the allegations made by Babisa Kuar in her suit against

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Ram Saran and others earlier in the year in which she obtained a declaration of her title. The suit was brought and the will was made long after the mortgages now in suit and are parts of a scheme which was designed to enable the family to get rid of the mortgages in suit. The failure of the Receiver to successfully resist the suit brought against him by Babisa Kuar may be explained on the ground that he was an outsider, who had no knowledge of the facts, and was, therefore, severely handicapped in defending the suit. We have no doubt that the suit brought by Babisa Kuar against Ram Saran and others in 1894 was a collusive proceeding taken for the purpose of evading the mortgages, which are now in suit. We agree with the court below that Ram Saran, grandfather of defendant No. 5, was the son of Ram Phal and Babisa Kuar. It follows that the mortgages in suit are binding upon the property purchased by Dulhin Ram Kuar and now in charge of the Courts of Wards.

The question of law was raised in the court below in a somewhat peculiar manner. The suit was instituted on May 7th, 1909, the written statement of the Collector of Ghazipur as Manager of the estate of Dulhin Ram Kuar under the Court of Wards, was filed on September 1st, 1909. In this written statement no plea is taken as to the suit being open to any sort of objection by reason of the failure on the part of the plaintiffs to comply with the provisions of section 16 of the Court of Wards Act, nor was any issue struck on this point before the parties went to trial. The taking of evidence in the case commenced on January 11th, 1910, and was practically concluded on March 4th, 1910. On April 13th, 1910, one stray witness for the defendants, who had somehow been left over, was examined. That same day a petition was put in on behalf of the Collector of Ghazipur which has been printed on page 156A. This petition tendered in evidence a notification which appeared on page 768 of the United Provinces Gazette (Part II) of the 25th of April, 1903, and a similar notification from the Vernacular Gazette of May 23rd, 1903. It was merely stated that these papers had an important bearing on the case, and "should be placed on the record and read along with the evidence." This having been permitted by the court ; these

papers were made the basis of an entirely fresh set of pleadings, the contentions raised being of such a nature that, if accepted in their entirety, they would involve the dismissal of the entire suit. The notifications in question are those required to be issued by section 16 (1) of the United Provinces Court of Wards Act (Local Act No. III of 1899), calling upon all persons having claims against the ward (in this case, against Dulhin Ram Kuar) or her property, to notify the same in writing to the Collector of Ghazipur within six months of the date of the publication of the said notices. It is admitted that the claim upon which the present suit is based was never notified to the Collector as thus required; and it is quite clear that it ought to have been so notified. Dulhin Ram Kuar is the substantial defendant in the case, she was impleaded as "a subsequent transferee of all the properties mortgaged in the documents sued on." She is in fact the present owner of the said properties; for the validity of her document of title in no way depends on the respective rights of Babisa Kuar, of Ram Saran Singh or of the heirs of Nanku Singh. In the sale-deed of December 7th, 1902, upon which her title rests, she took the precaution of getting included amongst her vendors every single person who had any possible claim to the ownership of the property transferred, and she thus obtained a clear title unaffected by any question which might afterwards be raised as to the respective rights of her vendors, so long as any one of them had a good and valid title.

The possible penalties provided by law for failure to notify a claim to the Collector, as required by section 16 of the Court of Wards Act, are two:—

(i) By reason of section 18 of the said Act a claim not notified under section 16 "shall, notwithstanding any law, contract, decree or award to the contrary, cease to carry interest from the date of the expiry of the period prescribed in that section."

(ii) By reason of section 20 of the same Act, if any document in the possession or under the control of any person is not produced by him, "*as required by section 16,*" such document shall not be admissible in evidence against the ward in any suit brought thereafter to enforce any liability

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under the same, "unless good cause be shown to the satisfaction of the court for the non-production thereof before the Collector."

The appellant claims the benefit of both these provisions. The plaintiffs-respondents have put forward substantially three arguments in reply.

First,—It is contended on their behalf that there has been, on the part of the Collector of Ghazipur, no sufficient publication of the notice required by section 16 of the Court of Wards Act, so as to entail any penalty whatsoever on the plaintiffs by reason of their failure to notify their claim to that officer. The required notices in the United Provinces Gazette are shown to have been duly published, both in English and in the Vernacular; but it is not shown that there was any other publication than this. The second clause of section 16 of the Court of Wards Act provides as follows :—

"The notice shall also be published at such places and in such other manner as the Court of Wards may, by general or special order, direct."

There is no suggestion that any special orders were issued in the present case directing further publication of the notice to be effected in any particular manner. So far as we can ascertain, no general orders have been issued by the Board of Revenue, which the Court of Wards for the United Provinces of Agra and Oudh (*vide* section 4 of the Court of Wards Act No. III of 1899) directing publication of notices under section 16 of the said Act otherwise than in the Provincial Gazette. On any reasonable construction of the provisions of the Act above quoted, it would appear that the Collector of Ghazipur having received no general or special orders from the Board of Revenue directing him to publish this notice at any other place or in any other manner, lay under no obligation to do anything more than get the notice published in English and in the Vernacular in the Provincial Gazette. Nor can it be said that the Board of Revenue lay under any positive obligation to issue general or special orders, for the words of the section as quoted, leave the Court of Wards a discretion in the matter. We were referred to a ruling of this Court in *W. Barrow v. Gaya Prasad*⁽¹⁾; but

(1) [1912] 9 A. L. J. R., 558.

this was based on the wording of sections 10A. and 10B. of the Bengal Court of Wards Act (Act IX of 1879) as amended by Act I of 1906. The provisions of these sections differ from those of section 16 of our Local Act in one matter of detail which happens to be of decisive importance as regards the point under discussion. By the United Provinces Act, as soon as the required notice has been duly published by the Collector, a double obligation is laid upon creditors; they must not only notify their claims against the ward or his property, giving full particulars of the same, but they must produce before the Collector *with the statement of claim* every document on which they rely in support thereof. Under the Bengal Act, after the creditor has put in a written statement of claim and furnished full particulars, he is only bound to "produce all documents which are in his possession, power or control" within such time as the Court of Wards may appoint. That is to say, the officer acting for the Court of Wards in the matter has laid upon him, after a claim has been filed, the duty of appointing a time within which documents must be filed. It was held by this Court that if such officer failed to fulfil this duty, and did not give the creditor concerned the requisite notice that his documents must be filed within a certain time, no penalty could be enforced against a creditor merely on the ground that he had failed to produce his documents before the Court of Wards. There is no similar provision in the United Provinces Act, nor was any obligation laid upon the Collector of Ghazipur in this case to give the present plaintiffs notice that any mortgage deed in their possession which they desired to make the basis of any claim against the property of Dulhin Ram Kuar must be presented before him by some fixed date subsequent to the presentation of their claim. On the contrary, both by the wording of the Court of Wards Act itself, and by that of the notice published in the Gazette, all creditors were required to present their claims and the documents on which the same were founded to the Collector within six months of the publication of the notice. Provisions of law which operate so as to impose a penalty or disability upon a person who fails to comply with them require no doubt to be strictly interpreted; and for this reason, in the reported case, it was held that

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Singh.

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the serious penalty of excluding his document of title from admission in evidence should not be imposed upon a creditor until it was shown that every notice required by law had been duly given to him, and every obligation imposed by law upon the Court of Wards strictly performed. In the present case the law as it stands required nothing more from the Collector of Ghazipur, once he had got the notice published in the Gazette in English and in Vernacular than to sit still and await the presentation of claims, the law itself laid upon creditors the obligation to produce detailed statements of claim ; accompanied by all necessary documents, within the period limited by the notice itself. The first contention on behalf of the plaintiffs-respondents, therefore, fails.

Secondly.—It was suggested that the obligation to produce documents is laid upon creditors who notify their claims. The argument is that a creditor who does not notify his claim at all may make himself liable to the provisions of section 18 already quoted, but cannot be held liable to the further disability laid down by section 20. There is nothing in the wording of the Act to support this contention ; indeed it appears contrary to the clear intention of the provisions under consideration. Something was said about the proviso embodied in the second clause of section 17 ; but it would be contrary to all sound principles of interpretation to apply this proviso to the subsequent sections 18 and 20. We must overrule this contention also.

There remains, however, a *third* argument for the plaintiffs, which must in our opinion prevail, so far as the penalty imposed by section 20 is concerned. The provisions of this section left the court below a discretion to admit the plaintiffs' documents of title in evidence, despite their non-production before the Collector. That discretion has been exercised in favour of the plaintiffs, and we are not prepared to hold that it was exercised wrongly. On behalf of the appellant it was contended that there had been no real exercise of discretion, because the plaintiffs had never been called upon to explain the non-production of these documents before the Collector. It has already been pointed out that the admission of these documents in evidence was not challenged at the proper time, and,

strictly speaking, was not challenged at all. At a late stage of the case, long after the documents had been put in evidence and after the suit had gone to trial on the basis of the said documents, a petition was put in which, on the face of it, asked for nothing beyond the admission of two documents in evidence on behalf of the Court of Wards. After the Gazette notifications had thus been got on to the records, they were used in argument to attack the very foundation of the plaintiff's case. The court had no real opportunity at this stage to turn round on the plaintiffs and call upon them to explain the non-production of their mortgage deeds before the Collector. We can conceive of no reason for their non-production if the plaintiff in fact saw the notices in the Provincial Gazette and understood the obligation thereby cast upon them. We cannot relieve the plaintiffs of all the consequence of their failure to comply with the provisions of section 16 of Act III of 1899 ; but to exclude their documents of title altogether from the record would be to exact an extreme penalty for a piece of neglect due to mere ignorance. The Court of Wards Act of 1899 had not long been in force ; the Board of Revenue had neglected to avail itself of its powers to direct publication of the Collector's notice in some more effective form. The Civil Court having a discretion as regards the admission of these documents, it seems clear to us under all the circumstances that this discretion has been rightly exercised in favour of the present plaintiffs.

We cannot relieve them from the consequences of the provisions of section 18 of the Act as regards interest ; here the law has left us no discretion. We so far accept this appeal that we direct the decree of the court below to be modified by disallowing all interest after the 23rd of November, 1903, six months from the date on which the Collector of Ghazipur completed the fulfilment of the duty laid upon him. As regards the costs of the suit, we feel bound to take notice that the appeal has failed on the issues of fact to which the bulk of the evidence was directed. We order that the parties pay and receive costs in both courts in proportion to success, but that the charges of printing and translating the record in this court be borne entirely by the appellant.

Appeal allowed—Decree modified.

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 1912.
 Collector of
 Ghazipur
 v.
 Balbhaddar
 Singh.
 Piggott, J.

CIVIL,

1912.

June, 26.

KARAMAT
HUSAIN, J.
TUDBALL, J.

GAJADHAR TELI

versus

BHAGWANTA AND ANOTHER.*

Res judicata—Prior and subsequent mortgages—Prior mortgagee made party to a suit on subsequent mortgage—Prior mortgage not set up—Parties—Prior mortgagee not a necessary party.

A prior mortgagee is not a necessary party to a suit wherein a puisne mortgagee seeks to sell the property subject to the prior mortgage. Where, however, the prior mortgagee is impleaded (though as a mortgagor of other properties) in the suit of the puisne incumbrancer, and is aware of the fact that the latter is seeking to sell the property without the burden of the prior mortgage upon it, and omits in that suit to set up his encumbrance, *held*, that a suit on foot of the prior encumbrance is barred by the rule of *res judicata*.

SECOND APPEAL from a decree of Babu Rama Das, Additional Subordinate Judge of Azamgarh, modifying a decree of Babu Raghunath Prasad, City Munsif.

Suit for sale on a mortgage.

The facts and arguments appear from the judgment.

Surendra Nath Sen, for the appellants.

Ghulam Mujtaba, for the respondents.

The judgment of the Court was delivered by

Tudball, J

TUDBALL, J.—The facts of the case, out of which this appeal has arisen, are as follows:—On 20th June, 1885, Husein Ali and Jawwad Husain mortgaged 6 bighas, 1 biswa and 18 dhurs of zamindari to Radhe and Chirkil. On 19th January, 1889, Husein Ali sold 3 bighas, 19 dhurs out of the same to Abid and Shafi. A part of the sale consideration being left with the vendees to pay off the mortgage (which they failed to do).

On the same date, Abid and Shafi and their two brothers, Nadir and Yusuf, mortgaged several properties to Mahadeo Prasad. Among these was the 3 bighas, 19 dhurs zamindari, purchased by Abid and Shafi alone. On 4th January, 1890, Radhe and Chirkil sold their mortgagee rights under the

* S. A. No. 962 of 1911.

deed of 20th June, 1885, to Nadir. In 1897, Mahadeo Prasad brought a suit for sale on his mortgage. Nadir was then dead and in his place Ashraf and Musharraff, his sons, were impleaded as his heirs.

An examination of the plaint shows that Mahadeo Prasad, among other reliefs, asked for sale of the 3 bighas, 19 dhurs zamindari in default of payment. He did not seek to sell it subject to the prior mortgage. He sought the sale of the property, plain and simple, and made no mention of the prior mortgage. Ashraf and Musharraff, though they were parties to the suit, did not put forward their prior mortgage and did not claim either to have their mortgage redeemed or to have the property sold subject to that mortgage.

Mahadeo Prasad's suit was decreed, and this property was sold and purchased by the decree-holder. It was not sold subject to the mortgage. On 15th October, 1909, Ashraf and Musharraff sold their rights as mortgagees to Gajadhar Teli who, therefore, brought the present suit for sale of the 6 bighas, 1 biswa, 12 dhurs, which were mortgaged under the deed of 1885. Mahadeo Prasad being dead, his heirs, Musammat Bhagwanta and Musammat Basanta, have been impleaded as the purchasers of the 3 bighas, 19 dhurs. Among other defences, they pleaded that the claim of the mortgagee for the sale of this 3 bighas, 19 dhurs, was barred by the rule of *res judicata*. They urged that as Ashraf and Musharraff were parties to the suit by Mahadeo Prasad, they might and ought to have put forward the mortgage of 1885 in defence of Mahadeo Prasad's claim for sale of the property in question, and that having failed to do so, they or their transferee cannot now enforce the mortgage against that property.

The court of first instance held against them on the ground that the heirs of Nadir Ali were only impleaded in Mahadeo Prasad's suit as mortgagors and not also as prior mortgagees.

The two ladies appealed and the lower appellate court held in their favour and dismissed the suit as against them and the 3 bighas, 19 dhurs.

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1912.

Gajadhar Teli

v.

Bhagwanta.

Tudball, J.

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1912.
 Gajadhar Teli
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 Bhagwanta.
Tudball, J.

The plaintiff comes here on second appeal and urges that the decision of the first court was correct. The question is, whether the heirs of Nadir Ali in the suit of Mahadeo Prasad not only might but also ought to have put forward their prior mortgage in defence to the claim of Mahadeo Prasad to put the property to sale in satisfaction of his debt. As we have already pointed out, Mahadeo Prasad did not admit the prior mortgage and seek to sell the property subject thereto.

A prior mortgagee, no doubt, is not a necessary party to a suit, wherein a puisne mortgagee seeks to sell the property subject to the prior mortgage, but in the present case, though the prior mortgagee was impleaded as a mortgagor of other properties, he was actually a party to the suit and was aware of the fact that the mortgagee, Mahadeo Prasad, was seeking to sell the property without the burden of the prior mortgage upon it.

In our opinion, in these circumstances, they ought to have put forward their prior mortgage in defence of the claim.

A large number of rulings have been called to our attention. The majority do not assist us. The principle, however, to be found in the decision of their Lordships of the Privy Council in *Sayed Muhammad Ibrahim Husain Khan v. Ambika Prasad Singh* ⁽¹⁾ is clearly applicable.

In that case a mortgagee was made a defendant to a suit on a mortgage prior to his own. He omitted to set up his rights under his mortgage and also under another which was prior to the one sued on and which he had paid off.

It was held that a suit subsequently brought by him to enforce those rights was barred under the Code of Civil Procedure (Act XIV of 1882, section 13, Ex. II). The case of *Surji Ram Marwari v. Barhamdeo Prasad* ⁽²⁾ is distinguishable. The judgment of MUKERJI, J., at the bottom of page 349 runs as follows:—"The appellants, in that suit sought not to redeem any prior encumbrances but merely to sell the property subject to all prior charges."

(1) [1911] 9 A. L. J. R., 332. (2) [1905] 1 C. L. J., 337.

In the case before us, Mahadeo Prasad did not in his suit seek to sell the property subject to any prior charges. It is true that the heirs of Nadir Ali were impleaded as mortgagors under the deed of Mahadeo Prasad but they were parties to the suit. Admittedly, they might have pleaded their prior mortgage in defence, and, in our opinion, when they saw that Mahadeo Prasad was seeking to sell this property without regard to the prior mortgage, they ought to have pleaded their rights under the deed of 1885. Not having done so, the present suit is barred under the terms of section 11, Civil Procedure Code.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

CIVIL.
1912.
Gajadhar Telu
v.
Bhagwanta.
Tudball, J.

RAM PIARI RAI

versus

KING-EMPEROR.*

*Criminal Procedure Code (Act V of 1908), sections 476 and 537—
Notice—Want of notice, an irregularity—Ground for reversal.*

CRIMINAL.
1912.
July, 3.
KNOX, J.

Section 476 of the Criminal Procedure Code nowhere says that notice in proceedings under that section shall be given to a person who is immediately concerned thereby. Want of notice under that section is an irregularity in procedure.

The High Court always looks with disfavour upon an order made under section 476 without notice being given to the persons immediately concerned. At the same time any irregularity in the proceedings taken under section 476 is not a sufficient ground for either reversing or altering an order passed by a court of competent jurisdiction.

CRIMINAL REVISION against the order of Babu Anand Sarup, Sub-Divisional Officer of Azamgarh.

The facts of the case appear sufficiently from the judgment of the Court.

W. Wallach, for the applicant.

A. E. Ryves (Government Advocate), for the Crown.

* Cr. Rev. No. 473 of 1912.

CRIMINAL.

1912.

Ram Piari Rai
 King-Emperor.

Knox, J.

The following judgment was delivered by

KNOX, J.—A Deputy Magistrate of Azamgarh, Budh Sen, tried one Durgahi Khan, for an offence under the Indian Penal Code. He convicted him of that offence on September 27th, 1911, and in the course of this trial he arrived at the conclusion that there was ground for enquiry into an offence under section 211, read with section 109 of the Indian Penal Code. It has been represented to me by the learned Government Advocate in the course of the argument to-day, that Deputy Magistrate, Budh Sen, considered this a case in which a preliminary enquiry should be made and moved the District Magistrate of Azamgarh to have such enquiry held by the Criminal Investigation Department. If Budh Sen had left the matter entirely in the hands of the Criminal Investigation Department, I should have had considerable doubt whether any enquiry held by them would come within the purview of the words of section 476, "such court after making any preliminary enquiry that may be necessary". But it appears from the record that on the 27th February and on the 28th February, the learned Deputy Magistrate proceeded to take the statements of Dargahi and of one Zulfan. These he placed upon the record. It is true that neither of the statements in question is headed with the words "In the matter of so and so". But it is argued before me that these statements were statements of Dargahi and Zulfan taken in the course of the preliminary enquiry, and his successor appears to have regarded them in that light. Deputy Magistrate, Budh Sen, went on leave. His successor took up the proceedings and recorded the following order :— "On a perusal of the record in *King-Emperor v. Dargahi*, decided by my predecessor, Babu Budh Sen, Magistrate of the first class, and the statements of Dargahi and Zulfan subsequently taken down by him in the course of the preliminary enquiry made by him, it appears to me that a false charge of cheating, etc. etc., was actively instigated and abetted by Ram Piari Rai." The order then goes on "I, as his predecessor (sic) in office, order the prosecution of Ram Piari Rai under section 211, read with 109 of the Indian Penal Code for having abetted the institution of a false charge of cheating in the court of Second Additional Magis-

trate at Rangoon. The file is submitted to the District Magistrate for favour of orders as to the trial of the accused (Ram Piari Rai)". The papers reached the District Magistrate on the 26th May, and on the same day there is an order by the District Magistrate, "The case is sent to the court of Pandit L. S. Khare for trial". It is this order of 6th May, 1912, passed by Babu Anand Swarup that I am asked to revise, on the ground that the Deputy Magistrate could not legally pass an order under section 476 of the Code of Criminal Procedure at the stage when he did pass it, that there were no materials on the record of the case of *King-Emperor v. Dargahi* upon which an order could be passed, and that the order which was passed was without notice to the petitioner. The petitioner questions whether the statements of Dargahi and Zulfan can be said to have been taken in a proceeding under section 476 of the Code of Criminal Procedure. My attention was also called to the great delay that had occurred between 27th September, 1911, and 6th May, 1912.

Owing to the absence of any words to earmark this proceeding and to the further fact, which is admitted by the learned Government Advocate that this preliminary enquiry has been more or less of a secret nature, it would not have been easy to say that these were proceedings taken under section 476. But from the words in which the order of 6th May, 1912, is couched, it is clear that the learned Magistrate, who passed the order of 6th May, 1911, did so in a proceeding which he understood to be under section 476 of the Code of Criminal Procedure. The proceedings are certainly of a somewhat extraordinary nature. But after hearing all that has been said, I cannot find that they are beyond the letter of section 476. The action of the Magistrate is not quite what is contemplated by that section, and there is no doubt that this Court has always looked with disfavour upon an order made under section 476, without notice being given to the persons immediately concerned. At the same time any irregularity in the proceedings taken under section 476, is not sufficient ground for either reversing or altering an order passed by a court of competent jurisdiction (*vide* section 537, Criminal Procedure Code). Deputy Magistrate Budh Sen and his successor in office, Deputy Magistrate Anand

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1912.

Ram Piari Rai
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King-Emperor.

Knox, J.

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1912.

Ram Piari Rai
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King-Emperor.

Knox, J.

Swarup, had undoubtedly jurisdiction to take proceedings under section 476, and the order that I am asked to revise is an order passed by a court of competent jurisdiction under that section. Had it been shown to me that any irregularity in the procedure had in fact occasioned a failure of justice, section 537 would not of course apply. Ram Piari Rai has, I understand, been arrested in consequence of this order, but it would be a long step to take, to say that his arrest has, in fact, so far as he is concerned, occasioned a failure of justice. He will have ample opportunity for answering the complaint which has now been instituted against him.

Section 476 nowhere says that notice in proceedings under that section shall be given to a person who is immediately concerned thereby. And while, I think, that it is always fairest and a course which should be followed, that a notice should be given, I cannot put the want of notice on a higher ground than irregularities in procedure. The case of *Mithan Lal v. King-Emperor** decided on 22nd December, 1909, was brought to my notice. That was a case in which this Court has held that entirely fresh proceedings under section 476 had been held, and it was in connection with this that my learned brother said that except under very special circumstances proceedings under section 476 of the Code of Criminal Procedure should be taken at an early date after the decision of the original case. The case before me is said to be, and appears to be, a case of very special circumstance. So, on both grounds it is to be distinguished from the case cited. I decline to interfere and dismiss this application.

Application dismissed.

* Not reported.

BRIJBASI LAL
versus
 KING-EMPEROR.^a

CRIMINAL.

1912.

July, 11.

KNOX, J.

Criminal Procedure Code (Act V of 1908), section 263(b)—Statement of reasons for conviction to be recorded.

Under section 263 (b) of the Code of Criminal Procedure a brief statement of reasons for conviction must be given. These reasons should amount to showing that there is evidence to prove the existence of the ingredients necessary to complete the offence.

CRIMINAL REFERENCE made by W. D. Burkitt, Esq., Sessions Judge of Saharanpur.

The facts of the case will appear from the following order of reference of the Sessions Judge of Saharanpur :—

“ This case was filed as an appeal, but I have taken it up as a revision. The applicant, Brijbasi, was convicted by a Deputy Magistrate of the first class of an offence punishable under section 3 of the Gambling Act and sentenced to a fine of Rs. 100, or in default 2 months' simple imprisonment. This accused is an agent of the lessee of the premises where the gambling is alleged to have taken place. I have examined the evidence, of which the Deputy Magistrate has recorded notes, and I have also examined the judgment. Neither in the notes of the evidence nor in the judgment do I find any indication to show how the Magistrate came to the conclusion that the enclosure in question came within the definition of a common gaming house. Under the provisions of section 263 (b) of the Code of Criminal Procedure a brief statement of reasons for the conviction must be given. These reasons should, in my opinion, amount to showing that there is evidence to prove the existence of the ingredients necessary to complete the offence. There is nothing either in the evidence or in the judgment to show that cards, dice, etc., were kept or used for the profit or gain of any person whatsoever. All that appears from the record is that there was gambling going on. That Brijbasi derived any benefit

* Cr. Ref. No. 428 of 1912.

CRIMINAL.

1912.

Brijbasi Lal
v.
King-Emperor.

from the gamblers by way of any of the methods referred to in the first section of the Gambling Act, there is nothing to prove. I, therefore, consider that this conviction is contrary to law and recommend that it and the sentence be set aside."

On the record being laid before Court, the following order was passed by KNOX, J.—Read the judgment by the Sessions Court of Saharanpur, dated May 15th, 1912. Read the Magistrate's explanation, dated May 29th, 1912. The view taken by the learned Sessions Judge is correct. The conviction and sentence are set aside. The fine or any portion of it, if paid, will be returned.

Conviction set aside.

SRI CHAND

versus

MURARI LAL.*

CIVIL.

1912.

July, 17.

RAFIQ, J.
PIGGOTT, J.

Provincial Insolvency Act (No. III of 1907,) section 16, clauses (2) & 34 (1)—Execution of decree against the insolvent—During pendency of insolvent proceedings—Exclusive right of the decree-holder to property attached and to money attached sold before order of adjudication—Right of the decree-holder.

S held a decree against M. Proceedings to have M declared insolvent were pending from February 21, 1911, to February 1, 1912. S had notice of these proceedings. While the insolvency proceedings were going on, S executed the decree and attached M's immovable property which he put up to sale in January, 1912. He also attached in November, 1911, a sum of money which had been deposited in court to the credit of M. The sale-proceeds were also deposited in court.

Held (1) that S was entitled to get the sale-proceeds which were assets realised in the course of execution within the meaning of section 34 of the Provincial Insolvency Act and were not the property of the judgment-debtor which could vest in the receiver; (2) that the money attached in November, 1911, remained the property of the insolvent, and S was not entitled to get it in preference to the receiver.

* F. A. F. O. No. 79 of 1912.

APPEAL from an order of Babu Sushil Chandra Banerji,
Officiating Second Additional Judge of Meerut.

Proceedings in insolvency.

CIVIL.
—
1912.
—
Sri Chand
v.
Murari Lal.

The facts were :—Ram Saran Das and two others were, on an application by one of their creditors, dated 21st February, 1911, adjudged insolvents on 1st February, 1912. The appellant, Sri Chand, was one of the creditors and was made a party to the insolvency proceedings. In execution of a certain decree which Sri Chand had obtained against the persons adjudged insolvents, he attached, in November, 1911, a sum of Rs. 1,139-12-3, which was in deposit in the court of the Subordinate Judge to the credit of those persons; and, further, caused a house of theirs to be sold by auction, the sale proceeds of which were deposited in court to his credit in January, 1912. At the date of the order of adjudication, namely, 1st February, 1912, both these sums of money remained unpaid to Sri Chand. He applied, on 6th March, 1912, for payment of these sums to himself, claiming, under section 34 (1) of the Provincial Insolvency Act, priority over the receiver. The application was refused. From the order of refusal he appealed to the High Court.

M. L. Agarwala, for the appellant :—Sri Chand has priority over the receiver in respect of the two sums. There was nothing to prevent him from executing his decree and realizing the money for himself as long as the order of adjudication was not passed. Both the sums are assets "realized," within the meaning of section 34 (1), before the date of the order of adjudication. As to the item of Rs. 1,139-12-3, as soon as Sri Chand attached the money, it became payable to him and could be said to have been "realized." Upon the attachment the court had no option but to make it over to him; the writing of a formal order being, therefore, only a mechanical act, its absence is immaterial. When the money was attached it came to be at my disposal and ceased to be the property of the judgment-debtors.

[PIGGOTT, J. :—By the mere fact of attachment the money did not cease to belong to the judgment-debtors. Could not another decree-holder by attaching the money claim contribution as against Sri Chand?]

CIVIL.

1912.

Sri Chand
v.
Murari Lal.

Decree-holders attaching subsequently to the receipt of the money by the court which ordered the first attachment cannot claim contribution.

Srinivasa Ayyangar v. Seetharamayyar, [1895] I. L. R., 19 Mad., 72.

The words "assets realized" were also used in section 295 of the old Code of Civil Procedure. The meaning of the word "realized" as used there was explained in

Manilal Umedram v. Nanabhai Maneklal, [1903] I. L. R., 28 Bom., 264.

The money was in deposit in the court of the Subordinate Judge; it was attached by an order of the court of the Second Additional Subordinate Judge; and as soon as it was received by the latter court, it became an asset "realized." I also rely on the case of

Debi Prasad v. O. M. Chien, [1912] 9 A. L. J. R., 707.

Similarly, as regards the sale proceeds of the house, as soon as the money was paid into court, it became an asset realized, although it was not actually paid over to Sri Chand. The ruling relied on, by the lower court, in

Frederick Peacock v. Madan Gopal, [1902] I. L. R., 29 Cal., 428 F. B., is clearly distinguishable. There the property had been attached but not sold prior to the order of adjudication and appointment of a receiver.

The respondent (receiver) was not represented.

The judgment of the Court was delivered by

Piggott, J.

PIGGOTT, J.—In this case, the appellant, Sri Chand, held a decree against one Murari Lal. Proceedings to have this judgment-debtor declared insolvent were pending from February 21st, 1911, to February 1st, 1912. Sri Chand, as one of the creditors, had notice of these proceedings. While, however, they were going on, he took an opportunity to continue executing his decree, and we can find nothing in law to prevent him from doing so, up to the date when an order of adjudication was passed. He attached certain immovable property of his judgment-debtor and got it put up to sale, and the sale proceeds were deposited in court in the month of January, 1912. We think he was entitled to the money so deposited, and the order of the court below to the contrary was wrong. The deposit was for the benefit of the decree-holder. It was not the property of the judgment-debtor which could vest in the court or in the official receiver under

the provisions of section 16, clause (2) of the Provincial Insolvency Act, and it also came within the definition of the assets realized in the course of execution within the meaning of section 34 of the same Act. We think, however, that the order of the court below was right and the appeals should not be allowed in respect of another item of Rs.

- 1,139-12-3. This seems to have been the surplus proceeds of a sale of some other property of Murari Lal's in execution of some other decree. In the month of November, 1911, it was lying to the credit of Murari Lal in the court of the Subordinate Judge of Meerut. Sri Chand applied to the court executing his decree to attach this money for his benefit, and obtained an order of attachment. But nothing further had been done before the order of adjudication against Murari Lal was passed. There had been no order under Rule 8 of Order 21, Code of Civil Procedure, vesting the money so attached in the decree-holder. It was, therefore, the property of the insolvent on the date on which the order of adjudication was passed and so vested in the insolvency court and became divisible among the creditors. We are not prepared to hold that section 34 of the Provincial Insolvency Act gives the appellant, Sri Chand, any special claim in respect of this money. It may have been, and no doubt was, realized in the course of the execution of the other decree in the execution of which the sale took place; but it was attached by Sri Chand simply as moveable property belonging to his judgment-debtor in the hands of the court of the Subordinate Judge. It was, therefore, subject to the provisions of the Code which deal with the satisfaction of a decree by attachment of movable property. We think the ruling relied on by the court below in *Frederick Peacock v. Madan Gopal* (1) is in point and should govern our decision. We, accordingly, allow this appeal only to this extent, that we set aside the order of the court below as regards the sale proceeds deposited in the court of the Second Additional Subordinate Judge of Meerut in the month of January, 1912, as proceeds of the auction sale held in execution of Sri Chand's own decree. The money thus deposited, Sri Chand is entitled to realize and to apply to the satisfaction of his decree.

(1) [1902] I. L. R., 29 Cal., 428

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Murari Lal.

Piggott, J.

We dismiss the appeal as regards the attached item of Rs. 1,139-12-3 holding that the court below was right in directing this sum to be realized for the benefit of the creditors in insolvency. The appellant will get his proportionate costs.

B. K. M.

Appeal allowed in part.

MAHARAJA OF BENARES

versus

LALJI SINGH AND OTHERS.*

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RICHARDS, C J.
BANERJI, J.

Civil Procedure Code (Act V of 1908), section 230—Decree upon compromise against the lessees and on their failure to pay against the property of the surety—Execution against surety after lapse of 12 years.

A decree was passed upon a compromise against certain lessees and their surety. The decree provided that the amount of it should be realised in the first instance from the lessees by annual instalments, and in the event of failure, it would be recoverable by the sale of certain immovable property which the surety had hypothecated. The decree was put into execution as a simple money decree more than 12 years after the date of its passing against the lessees. *Held*, that section 230 of the Code of Civil Procedure of 1882 applied, and the decree could not be executed after the expiration of 12 years from the date thereof.

APPEAL under section 10 of the Letters Patent from a judgment of Mr. Justice Karamat Husain, differing from Mr. Justice Chamier, confirming a decree of G. A. Paterson, Esq., District Judge of Benares, who revised a decree of Babu Srish Chandra Basu, Subordinate Judge.

The facts of the case will be found stated in the report of the case in 9 A. L. J. R., 79.

Beni Madho Ghosh and *Sarat Chandra Chaudhri*, for the appellant.

Gulsari Lal, for the respondents.

* L. P. A. No. 21 of 1912.

The judgment of the Court was delivered by

BANERJI, J.—The facts connected with this appeal are as follows: A suit was brought against certain lessees and their surety. The suit resulted in a compromise decree which provided that, in the first instance, the lessees should pay the amount of the decree by instalments and that the decree should be capable of execution against them. If the decree-holder failed to realise the amount of his debt in this way from the lessees; then, he was to be entitled to bring the property which the surety had mortgaged to sale. The decree was granted in May, 1897. The present application for execution was made on the 5th of June, 1910, that is to say, more than twelve years after the granting of the decree. The application was made against the lessees only. It was an application to execute the decree not as a mortgage-decree but as a simple money decree. Section 230 of Act XIV of 1882 provides that where an application to execute a decree for the payment of money or the delivery of other property has been made under this section and granted, no subsequent application to execute the same shall be granted after the expiration of twelve years from *inter alia*, the date of the decree or the date upon which payment of money was ordered by the decree. It has been conceded here that if the decree can be treated as a simple money decree, then it was barred by limitation by virtue of the provisions of section 230, more than twelve years having elapsed from the date of the default in payment of the instalments. It is argued, however, that because the decree directs that if the decree-holder has failed to realise the amount of his decree against the first three judgment-debtors, he can bring the property of the fourth judgment-debtor to sale, therefore this decree is not a decree for payment of money but must be regarded as a mortgage decree. It has no doubt been held by this Court that section 230 does not apply to a mortgage-decree, but, in our opinion, the compromise decree in the present case was a simple money decree as against the first three defendants, and only became a mortgage decree against the fourth defendant after default was made. It was a conditional decree for the sale of his property. We have already pointed out that it was being executed as a simple

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money decree, and that it could never have been executed against the first three defendants as anything else except a simple money decree. It comes within the very words of section 230, clause (iii). The case of *Pahalwan Singh v. Narain Das*⁽¹⁾ has been referred to. In that case the compromise decree was against a single defendant. It only differed from an ordinary mortgage decree under section 88 of the Transfer of Property Act by substituting certain instalments for the usual six months allowed for payment of the mortgage money. The application to execute such a decree was an application to execute a mortgage decree by sale of the mortgaged property. Therefore, it is quite clear that that case has no application to the present case. In our opinion the decree appealed against was correct, and this appeal should be dismissed. We, accordingly, dismiss the appeal with costs.

Appeal dismissed.

(1) [1900] I. L. R., 22 All., 401.

PRIVY COUNCIL.

SHAMU PATTTER

versus

(1) ABDUL KADIR RAVUTHAN AND OTHERS ; AND (2)
ABDUL RAJAK SAHIB AND OTHERS.

Transfer of Property Act (IV of 1882), section 59—"Attested", meaning of—Mortgage-deed—Attestation of mortgage-deed—Indian Succession Act (X of 1865), section 50(3)—Attestation on personal acknowledgment by the executant of his signature—Code of Civil Procedure (Act XIV of 1882), section 149—Power of the Court to frame an issue after the close of arguments

The word "attested" in section 59 of the Transfer of Property Act (IV of 1882) means the witnessing of the actual execution of the document by the person purporting to execute it.

Held, accordingly that a mortgage-deed is not valid under section 59 of the Transfer of Property Act when the witnesses to the deed were not present at its execution but had put their names on the document on the acknowledgment of the executant.

The provision as to attestation in section 50(3) of the Indian Succession Act (X of 1865) upon the testator's personal "acknowledgment" is quite a separate condition and in no sense an interpretation of the word "attest."

Sham Patter v. Abdul Kadir Ravuthan, [1908] I L R., 31 Mad., 215, affirmed.

Ranu v. Luxmanrao, [1908] I L R., 33 Bom., 44, approved.

Ganga Dei v. Shiam Sundar, [1903] I L R., 26 All., 69, overruled.

Held, that a trial Judge is fully empowered to frame an issue after the close of the arguments and decide the case on it under section 149 of the Code of Civil Procedure (Act XIV of 1882), the first part of which section leaves it in the discretion of the court to frame such additional issues as it thinks fit, whilst the latter makes it imperative on the Judge to frame such additional issues as may be necessary to determine the controversy between the parties, and that even had there been no such express provision in the Code, every court trying civil causes has inherent jurisdiction to take cognisance of questions which cut at the root of the subject-matter of controversy between parties.

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APPEALS against two decrees of the High Court of Judicature at Madras, affirming the decrees of the Subordinate Judge of South Malabar.

The first of the said suits was brought by the present appellant for the sale of the land comprised in a hypothecation deed (exhibit A), dated 30th May, 1899, and executed in favour of his predecessor in title by defendants Nos. 1 and 2. The second of the said suits in which the present appellant was a defendant was brought by attaching creditors of the said defendants Nos. 1 and 2 for a declaration that the hypothecation deed was void against them on the alleged ground that it had been executed fraudulently and without consideration. The suits were heard together; the hypothecation deed was admitted and evidence was given on the sole issue, which related to the consideration for the deed. After the evidence was completed a fresh issue was framed as to whether the deed was valid under Transfer of Property Act, section 59, relating to the attestation of mortgages. The Subordinate Judge decided this issue against the present appellant and held that the hypothecation deed was void on this ground only.

The learned Judges of the High Court affirmed the decision of the Subordinate Judge. They held that the executants of the deed had acknowledged and not actually affixed their signatures in the presence of the attesting witnesses and for this reason the attestation was insufficient and that the deed was consequently void. For a report of the judgments see

Shamu Patter v. Abdul Kadir Ravuthan, [1908] I.L.R., 31 Mad., 215.

The plaintiff appealed to His Majesty in Council.

DeGruyther, K. C., and *Kenworthy Brown*, for the appellant: The defendants in their pleadings admitted the execution of the mortgage and no issue as to its validity was, therefore, raised:

Code of Civil Procedure (Act XIV of 1882), section 146.

The mortgagor was not cross-examined on the question of attestation and the attesting witnesses were called to prove that the mortgagors had acknowledged that consideration was actually paid. They were not called to prove the deed. The decision as to the question of attestation depends on

evidence, but no evidence was taken relating to it. The point was raised in the argument and the Subordinate Judge framed an issue on it and decided the case without taking any evidence.

[Lord SHAW: Was any request made on your part for leave to give evidence, when the additional issue was raised?]

- There is no record of how it was raised and of what happened after it was raised. If the point had been raised when the evidence was being given, the appellant could have shown that the mortgagors signed in the presence of the attesting witnesses. Under section 149 of the Code the Judge has power to rectify errors in the issues framed. The court has no power to frame an issue upon the evidence in the case, *e. g.*, the defendant cannot be allowed to raise an issue after he has seen how the evidence goes. That is exactly what happened in this case, and it is submitted that the proceeding was altogether irregular and without jurisdiction. Reference was also made to

Section 147 and 148 of the Code.

The evidence on record shows that the mortgagor did not sign the deed in the presence of the witnesses, but he acknowledged the execution in their presence and the witnesses then attested the deed. It is submitted that the deed is validly attested under section 59 of the Transfer of Property Act (IV of 1882). In the case of a *pardanashin* lady no one sees her signing a deed, but her acknowledgment of execution is considered enough to satisfy the requirements of that section, wherein there are no words requiring the mortgagor to sign in the presence of the witnesses, or the witnesses to be present at the same time. In the absence of such express words a deed is duly attested under section 59 if the executant acknowledges his signature to the witnesses. So far as the words are concerned the words in section 59 are the same as those in the Statute of Frauds (1), under which the provision as to attestation is complied with if the witnesses sign the document on the acknowledgment by the testator of his signature :

Grayson v. Atkinson, [1752] 2 Ves. Sen., 454.

Ellis v. Smith, [1754] 1 Ves., Jun., 11.

White v. Trustees of the British Museum, [1829] 6 Bing., 310

Jarman on Wills, 6th ed., [1910] p. 114.

(1) 29 Car. II., c. 3, sec. 5.

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This meaning of the word "attest" was adopted by the Indian legislature in the Indian Succession Act (X of 1865), section 50 (3). Such was the interpretation of the word in question at the time of the passing of the Transfer of Property Act (IV of 1882). The Indian Companies Act (VI of 1882) was passed in the same year, and in section 39 it is provided that the article of association "shall be signed by each subscriber in the presence of and be attested by one witness at the least." If "attest" only meant signing in the presence of a witness, there was no necessity to include the words 'in the presence of' in the Indian Companies Act. But those words are there because "attest" meant signing by witnesses on the acknowledgment by the executant of his signature to them, Reference was also made to

Roscoe's Nisi Prius Evidence, 8th ed., pp. 135, 136, and 146.

In none of the cases relied on by the High Court it is decided that signing on the acknowledgment is not sufficient. The point for decision in this case was not before the court in any of those cases and the High Court erred in taking dicta from them and relying upon them.

Seal v. Claridge, [1881] L. R., 7 Q. B. D., 516, at p. 519,

decided that the grantee of a bill of sale, though he may be a solicitor, cannot be the attesting witness thereof under the Bills of Sale Act, 1878.

In Sharpe v. Birch, [1881] L. R., 8 Q. B. D., 111, at p. 114,

which was followed in

Ford v. Kettle, [1882] L. R., 9 Q. B. D. 139,

the question was whether the affidavit filed was defective under the Bills of Sale Act.

Casement v. Fulton, [1845] 3 M. L. A., 395,

dealt with the question whether the witnesses attested in the presence of each other. This question was again dealt with in the case of

Roberts v. Phillips, [1855] 4 E. and B., 450 ; 24 L. J. N. S. Q. B., 171.
In the cases of

Bryan v. White, [1850] 2 Rob, 315.

Burdett v. Spilsbury, [1842] 10 Cl. and F., 340.

the question decided related to the form of attestation :

In the case of

Girindra Nath Mukerjee v. Bijay Gopal Mukerjee, [1898] I. L. R., 26 Cal., 246,

the High Court of Calcutta has taken a view contrary to that now submitted, but this case was decided on the authority of

Sharpe v. Birch. [1881] L. R., 8 Q. B. D., 111,

which as already pointed out did not deal with the point at issue. The view submitted has been adopted by the Bombay High Court in the case of

Ramji v. Bai Parvati, [1908] I. L. R., 33 Bom., 44.

[Lord SHAW referred to *Ranu Laxmanrao*, [1908] I. L. R., 33 Bom., 44, where it is decided that an attesting witness is a witness who has seen the deed executed and who signs it as a witness, but the case in 27 Bom. is not considered by the court in arriving at the decision.]

In that case there were no attesting witnesses, but it was contended that the signature of the sub-registrar and that of the writer should be considered sufficient. The High Court, however, held that they were not sufficient. The Allahabad High Court is also in favour of the view now urged :

Ganga Dei v. Shiam Chunder, [1903] I. L. R., 26 All., 69.

[Sir JOHN EDGE : What is in the Wills Act ?]

The word "attest" is not used in that Act (XXV of 1838.)

In one of the suits the execution of the deed is not challenged. It is a suit by the mortgagee and the mortgagor admits the execution. Such an admission is sufficient proof of execution :

• The Indian Evidence Act (1 of 1872), section 70.

The respondents did not appear.

The judgment of their Lordships was delivered by

MR. AMEER ALI.—These are two consolidated appeals from certain judgments and decrees of the High Court of Madras, dated the 28th of January, 1908, affirming the decision of the Subordinate Judge of South Malabar at Palghat ; and the sole question for determination in both cases turns

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upon the meaning to be attached to the word "attested" in section 59 of the Indian Transfer of Property Act (IV of 1882), the first clause of which provides that where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

The appellant, Shamu Patter, as the representative of one Appu, deceased, brought a suit on the 18th of July, 1902, in the court of the Subordinate Judge of South Malabar, to enforce a mortgage alleged to have been executed in favour of Appu by the Ravuthan defendants. The other defendants to Patter's action were certain attaching creditors of the Ravuthans, who are respondents in the present appeals, and who challenged the mortgage on the ground, *inter alia*, that it was in fraud of creditors and without consideration. Their attachment on the mortgaged properties appears to have been partially removed at the instance of Patter, and they accordingly brought a suit sometime in 1903 in the court of the District Munsif of Palghat for a declaration that the mortgage transaction was fraudulent and without consideration, and ineffective so far as their rights were concerned. This suit was afterwards transferred to the court of the Subordinate Judge and was tried with Patter's action, the evidence in one being taken as evidence in the other.

The trial began, as appears from the Order Sheet, on the 7th of September, 1903; arguments were heard on the 16th and 17th of November, and judgment was reserved. On the same date, it appearing from the evidence of the witnesses to the mortgage deed that they were not present at its execution but had put their names on the document on the acknowledgment of the Ravuthans, the Subordinate Judge framed a supplemental issue in these terms: "Is it (meaning the mortgage deed) valid under section 59 of the Transfer of Property Act?" And on the 19th of November, holding that the document was invalid under that section, he dismissed Patter's suit save as regards a personal decree against the Ravuthans) and by a separate judgment decreed the action of the creditors.

From these two decrees Patter appealed to the High Court of Madras, which has upheld the lower court's decisions.

In the present appeals the judgments of the Courts in India have been challenged on two grounds; first, that the Subordinate Judge acted irregularly and without jurisdiction in framing an issue after the close of the arguments and deciding the case on it; and secondly, that the Courts are in error in holding that the word "attested" in section 59 of the Transfer of Property Act implies the witnessing of the actual execution of a document.

With regard to the first point their Lordships are of opinion that section 149 of the Civil Procedure Code (Act XIV of 1882) which is applicable to the proceedings, is conclusive. That section declares that the Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the controversy between the parties shall be so made or framed.

The first part of the section leaves it in the discretion of the Court to frame such additional issues as it thinks fit, whilst the latter makes it imperative on the Judge to frame such additional issues as may be necessary to determine the controversy between the parties. The Subordinate Judge was, therefore, fully empowered to frame the issue on which he decided the case.

Even had there been no such express provision in the Code, their Lordships consider every Court trying civil causes has inherent jurisdiction to take cognisance of questions which cut at the root of the subject matter of controversy between the parties.

The substantial ground, however, on which the decrees of the High Court are impugned, has reference to the interpretation put upon section 59 of the Transfer of Property Act. It is contended on the authority of *Grayson v. Atkinson* ⁽¹⁾ and *Ellis v. Smith* ⁽²⁾ which was followed in 1829 in *White*

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(1) Decided in 1752, Ves. Sen, 454.

(2) Decided in 1754, 1 Ves., Jun., 11.

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v. *The Trustees of the British Museum* (1) that the learned Judges of the Madras High Court were in error in holding that the word "attested" in the section under reference means the witnessing of the actual execution of the document by the person purporting to execute it.

The construction put in those cases on the word "attested" occurring in section 5, c. 3, 29 Car. II.(2) no doubt support the contention of the appellant that attestation upon the acknowledgment of the executant is equivalent to being present at and witnessing the execution. They related, however, to the due execution of wills, and though the language of Lord HARDWICKE in *Grayson v. Atkinson* was sufficiently wide to cover other deeds, his interpretation has not passed without question in later cases. The eminent Judges who decided *Grayson v. Atkinson* and *Ellis v. Smith* themselves doubted the correctness as well as the expediency of widening the meaning of the word "attested," but felt overborne by authority. In the latter case the exact question for determination was whether a testator's declaration before three witnesses that it is his will is equivalent to signing it before them. Chief BARON PARKER began his judgment with the following important observation:—

* ° ° ° * *

"I confess, if this had been *res integra*, I should doubt whether the testator's declaration is a proper execution within the 5th clause; because, I think, an admission that it is sufficient tends to weaken the force of the statute, and let in inconveniences and perjuries."

WILLES, C. J., observed that he was not satisfied in his own mind that the testator's acknowledgment was sufficient, but he added "authorities bear me down and I must yield." And the Master of the Rolls pronounced the extended construction to be "a dangerous determination and destructive of those barriers the statute erected against perjury and frauds." The learned Judges, however, felt bound by the previous decisions, and proceeding on the principle of *stare decisis* decided in favour of the view now pressed before their Lordships regarding the construction of a section of the Indian Statute relating to a totally different subject.

(1) 6 Bing., 310.

(2) The Statute of Frauds.

As the question involved in these appeals is of considerable importance and there seems to be some divergence of opinion between the Indian High Courts, their Lordships do not desire to pass altogether unnoticed the other authorities discussed at the Bar as well as in the well-reasoned judgments of the learned Judges in the Madras High Court.

In *Casement v. Fulton* (1), which was decided in 1845, the question for decision was whether the signatures of two witnesses who had subscribed a will at different times but the first had acknowledged to the second that he had signed the same, amounted to sufficient compliance with the provisions of section 7 of the Indian Wills Act of 1838. Lord BROUGHAM, in delivering the judgment of the Judicial Committee, observed that—

“The Statute of Frauds(2) requires the will to be signed by the testator, in the presence of the witnesses; nevertheless, the construction put upon that important provision has been that an acknowledgment is equivalent to a signature. How far this latitude of interpretation was justified in principle we need not now stop to inquire, else it might well be suggested that to do an act in the presence of a witness, and to acknowledge having done it when the witness was not present, are two entirely different things, as different as the witnessing a fact or act, and the witnessing a confession of that fact or act”

And after referring to the hesitation with which the decision had been arrived at in *Ellis v. Smith*, refused “to carry one step further a construction which so great a weight of authority lamented and showed to have been ill-advised in its inception.”

The later cases are still more direct in the interpretation of the words “attestation” and “attested.” In *Bryan v. White* (3) Dr. Lushington in 1850 laid down that “attest means the persons shall be present and see what passes, and shall, when required, bear witness to the facts.” In 1855 Lord CAMPBELL, Chief Justice, in *Roberts v. Phillips* (4), enunciated the same rule as regards the word “attested,” that the witnesses should be present as witnesses and see it signed by the testator. And the principle was given effect to in the House of Lords in *Burdett v. Spilsbury* (5). The Lord

(1) 3 Moo I. A., 395. (2) 29 Car II., c. 3, s. 5.

(3) 2 Rob., 315, 317. (4) 4 E. and B., 450.

(5) 10 Cl. and F., 340.

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Chancellor summed up the conclusion in these words:—
“The party who sees the will executed is in fact a witness to it; if he subscribes as a witness he is then attesting witness.”

The meaning of the words “attest” and “attestation” has also been before the Courts under the Bills of Sale Act of 1878 (41 & 42 Vict. c. 31, ss. 8 & 14) and the interpretation put on them in *Roberts v. Phillips* and *Bryan v. White* has invariably been followed.

Section 50 of the Indian Succession Act (X of 1865) was referred to in support of the appellant's contention regarding the meaning of the word “attested” in section 59 of the Transfer of Property Act. The phraseology of the two sections are quite different, as different as in fact as the objects of the two statutes.

Section 2 of Act XXV. of 1838 (The Indian Wills Act) declared that after the passing of that Act, 29 Car., II, “shall cease to have effect” except to a limited extent within the territories of the East India Company. In section 7 the word “attested” is left out, but it is provided that the testator's signature “shall be made or acknowledged by him in the presence of two or more witnesses present at the same time.” The latter words gave rise to the question in *Casement v. Fulton*. Act X of 1865 (The Indian Succession Act) has substantially taken the place of the Indian Wills Act of 1838, and embodies the rules which constitute the law applicable in India to cases of intestate or testamentary succession, excepting as regards Mahomedans, for the major portion of this Act was made applicable to Hindus by the Hindu Wills Act. Section 50 provides for the due execution of what are called unprivileged wills, and paragraph 3 declares—

“The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

It will be noticed that the word "attested," which was omitted in section 7 of the Act of 1838, is re-introduced in section 50, and it is expressly provided that attestation may be effected on the acknowledgment of the testator. Had the word "attested" by itself conveyed the meaning that attestation upon the acknowledgment of the executant was sufficient, there would have been no reason for making an express provision in the section. The inference to be drawn from it is obvious. The Legislature considered it expedient in the case of wills to permit of witnesses "attesting the document," in other words, of testifying to its due execution, on the acknowledgment of the testator that it was in his hand, and as the word "attest" was not sufficient to validate such attestation, introduced an express provision to that effect. Section 68 of the Indian Evidence Act (I of 1872) which declares that "if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution," appears to their Lordships to indicate that the Indian Legislature used the word "attested" in the sense in which it has been construed through a series of decisions in the English Courts. Section 59 of the Transfer of Property Act in requiring that in a certain class of cases a mortgage "can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses," could only mean that the witnesses were to attest the fact of execution. Any other construction in their Lordships' opinion would remove the safeguards which the law clearly intended to impose against the perpetration of frauds.

The Calcutta High Court has in three cases arising under section 59, taken the same view as the Madras High Court has expressed in the present case. And although in one instance the Bombay High Court had extended the meaning of the word "attested" to include attestation upon acknowledgment, in *v. Ranu v. Laxmanrao* (1), the learned Judges, on the authority of *Burdett v. Spilsbury*, arrived at the same conclusion as the two other Presidency High Courts. The Allahabad High Court, however, in the case of *Ganga Dai v.*

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Shiam Sundar ⁽¹⁾, has taken a different view. The learned Judges seem to consider the introduction of the words "personal acknowledgment" in section 50 of the Indian Succession Act as an interpretation of the word "attest." They say as follows :—

* * * * *

"It seems to us reasonable to suppose that the interpretation put upon the word 'attest' in that section, in the absence of good technical or substantial reason to the contrary, should be taken to be the meaning in which the word is used in section 59 of the Transfer of Property Act"

With respect, their Lordships are wholly unable to follow the reasoning. As already observed, the provision as to attestation upon the testator's personal "acknowledgment" was quite a separate condition and in no sense an interpretation of the word "attest." In fact, it was provided that the witnesses might attest the document on witnessing the actual execution or on the personal acknowledgment of the testator of the execution. But that, in their Lordships' judgment, affords no warrant for extending the meaning of the word "attest." Nor do their Lordships agree with the view expressed by the learned Judges regarding the policy of placing a larger construction on the word in consequence of the "social institutions of the country." Those very institutions their Lordships consider make it necessary that "the barriers against perjury and fraud," to use the language of the Master of the Rolls in *Ellis v. Smith*, should not be removed upon speculative considerations.

On the whole their Lordships are of opinion that the judgment of the High Court of Madras is right, and that these appeals ought to be dismissed, and they will humbly advise His Majesty accordingly.

Douglas Grant, Attorney for the appellant.

The respondents did not appear.

J. M. P.

Appeals dismissed.

PRIVY COUNCIL.

• THE RANGOON BOTATOUNG COMPANY, LD.

versus

THE COLLECTOR, RANGOON.

*Practice—Land Acquisition Act (Act I of 1894), sections 53 and 54—
Right of appeal to the Privy Council—Effect of a reference under the
Act taken by two Judges of the High Court—A right of appeal must
be by express enactment.*

There is no appeal to the Privy Council as of right from an award of a High Court under the Land Acquisition Act, 1894.

Section 53 of the Land Acquisition Act, 1894, applies to an earlier stage in the proceedings and has nothing to do with an appeal from the High Court, and section 54 only applies to proceedings in the course of an appeal to the High Court and its force is exhausted when the appeal to the High Court is heard.

A right of appeal from any decision of any tribunal must be given by express enactment.

The Sandback Charity Trustees v. The North-Staffordshire Railway Company, [1877] L. R., 3 Q. B. D., 1, followed.

A special and limited appeal is given by the Land Acquisition Act from the award of "the Court" to the High Court. No further right of appeal is given. Nor can any such right be implied.

APPEAL from an award of the Chief Court of Lower Burma, dated the 11th day of May, 1908, and made with reference to the price to be paid to the appellants for certain lands compulsorily acquired under the Land Acquisition Act, 1894, for public purposes.

In a Revenue Department notification, dated the 1st March, 1906, the Lieutenant-Governor declared that certain land was required by the Port Commissioners of Rangoon for certain public purposes. Certain land belonging to the appellants was included in the notification.

In the course of the enquiry before the Collector the appellants contested the correctness of the area given in the notification and asserted that the correct area was 10'48 acres

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and not 10'40 acres, and in the course of the proceedings this contention was allowed and the Collector took the acreage of the appellant's land as being 10'48, and this figure was accepted by the parties. The enquiry before the Collector was a lengthy one, and his award, dated the 11th day of February, 1907, awarded as the market value of the lands of the appellants at the date of the publication of the notification the sum of Rs. 13,25,720 made up as follows :—

10'48 acres at Rs. 1,10,000 per acre	...	Rs. 11,52,800
15 per cent. statutory allowance	...	„ 1,72,920
		Total Rs. 13,25,720

The appellants were dissatisfied with the amount awarded to them and applied for and obtained a reference to the Chief Court. The reference was taken by two learned Judges of that Court. The parties agreed as to the amount awarded under all other heads of section 23 of the Land Acquisition Act and the only question for the Chief Court was the market value of the lands at the date of the publication of the notification, namely, the 3rd March, 1906.

The hearing of the reference occupied no less than 45 days during which over a hundred witnesses were heard and a great mass of documents examined. At the commencement of the hearing the Court at the request of the parties visited the lands in question. Ultimately, on the 4th May, 1908, the Chief Court pronounced their award, which was actually signed and dated as on the 11th May, 1908. The learned Judges held "that the sum awarded by the Collector has given the Botatoung Company all and probably more than the full market value of their property," and accordingly dismissed the reference with costs.

On the 23rd day of October, 1908, the appellants desiring to appeal to His Majesty in His Privy Council, presented their petition to the Chief Court for a certificate that as regards amount and value and nature the case fulfilled the requirements of section 596 of the Code of Civil Procedure, 1882. And on the 19th day of November, 1908, a certificate was granted to the effect prayed. But no question had been raised or determined as to the general right of the appellants

to appeal to His Majesty in His Privy Council against an award under the Act in question. This question was, however, raised at the hearing of the appeal as a preliminary objection to it.

C. M. Bailhache, K.C., J. Sankey K. C., and W. A. Jolly, for the appellants : A preliminary objection is raised that there is no appeal as of right. Land Acquisition Act, 1894, section 54, allows an appeal to the High Court, from which appeals to the Privy Council are regulated by the Code of Civil Procedure, 1908, section 109, which gives the High Court a discretionary power to give leave to appeal. It is submitted that in giving leave to appeal in this case, the Chief Court has rightly exercised its discretionary power. The Collector in making the award was not sitting as a court and therefore there can be no question of concurrent finding here. In England there is power to ask the arbitrator to state a case to the Court, but such power is limited to a question of law. It seems, however, that there is wider power in India under section 18 of the Land Acquisition. The ground of appeal here is that there was misapprehension of evidence, and the Privy Council has examined facts in an appeal under the Act.

See *Secretary of State for Foreign Affairs v. Charlesworth, Pilling & Co.*, [1901] L. R. A. C., 373, at pp. 391 and 395.

[Lord MACNAGHTEN : The appeal there was by special leave.]

There was an appeal as of right in the case of

Exra v. Secretary of State for India in Council, [1905] L. R., 32 I. A. 93.

[Lord MACNAGHTEN : In that case there was a difference of opinion between the Collector and the High Court.]

In the case of the

Secretary of State for India v. India General Steam Navigation and Railway Co., Ltd., [1909] L. R., 36, I. A., 200,

also there an appeal as of right. The Act does not forbid an appeal in terms.

S. O. Buckmaster, K.C., and C. H. Sargant, for the respondent : It is conceded that in two cases under the Act appeals were heard by the Board, but the reports of those

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cases do not show that this point was raised at the hearing. There is no right of appeal unless such a right is allowed by the practice of the court or by statute :

Sandback Charity Trustees v. North Staffordshire Railway Company,
[1877] L. R., 3 Q. B. D., 1, at p. 4

The Land Acquisition Act does not give any express right of appeal to this Board. Except for the fact that the court of arbitration constituted under the Act is in fact a chief court having ordinary jurisdiction, as such, there appears to be no indication whatever in the Act that in proceedings thereunder, the court is acting as a court of ordinary jurisdiction or otherwise than as a specially designated Tribunal of Arbitration. The decision of the Court is designated throughout the Act not as an order, decree, or judgment, but as an award. And the provision under section 54 of the Act of a special and limited right of appeal to the High Court (which would be entirely unnecessary, were the decision in question an ordinary order, decree or judgment) appears to point conclusively to the inference that the jurisdiction conferred by the Act on the High Court is of a special and peculiar character. The functions of the court under the Act are those of an arbitrator and not of a court of law, and accordingly there can be no other or further appeal from its award than in the case of any award by a private arbitrator except, of course, to the special and limited extent given by section 54 of the Act, and, indeed, it is manifestly improbable that there should be given in the case of arbitration of this kind in India a general right of appeal to the ultimate Tribunal on questions of fact as well as law when no corresponding right exists with regard to arbitrations in England of a similar character. For the last proposition see

Ex parte County Council of Kent and Council of Dover, [1891] L. R., 1, Q. B., 725.

In re Knight and Tabernacle Permanent Building Society, [1892] L. R., 2, Q. B., 613.

And Burgess v. Morton, [1896] L. R., A. C., 136, at p. 141.

When a reference is made under section 18 to 'the Court,' section 53 provides that the procedure under the Code of Civil Procedure will apply to the proceeding in the reference under the Act. There is only one appeal to the High Court from

the award of 'the Court' under the Act, but the reference in this case was heard by two Judges, who sat as 'the Court' and also as the High Court. There is no further appeal from their award. Reference was also made to sections 3 (b), 3 (d), 4 to 17, inclusive, 18 to 28 inclusive, 31, 51 and 52 of the Act.

Code of Civil Procedure, 1908, section 109, allows appeal from a decree or final order, but here there is only an award, not a decree or final order. The certificate in this case is, however, granted under section 596 of Act XIV of 1882. The appellants, who are not suitors, admit that the appeal is from an award. It is submitted that the Chief Court erred in giving the necessary certificate.

Bailhache, K. C., in reply. I concede that if there is any right of appeal, it must be by statute. But I submit that the Act does give the right. The High Court makes an order or a decree under section 54 of the Act.

[Lord MACNAGHTEN: The Act here carries the matter only to a certain stage. How do you go further?]

When you once get under the Act into the High Court, you get your right of appeal to the Privy Council from its order or decree under section 596 of the Civil Procedure Code, 1882. The complication here arises because two steps, reference to 'the Court' and appeal to the High Court, were taken together. But that does not prevent the application of the provisions of the Civil Procedure Code. 'The Court' under the Act in this case is the Chief Court, and by section 53 the provisions of the Code of Civil Procedure apply to all proceedings before the Chief Court.

Lord MACNAGHTEN.—Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

On July 16, 1912, Lord MACNAGHTEN delivered the following judgment, giving reasons for their Lordships' report:—

In this case a preliminary objection was taken to the appeal. Having heard the point fully argued, their Lordships came to the conclusion that the appeal was incompetent and they intimated that on that ground they would humbly advise His Majesty that the appeal should be dismissed with costs.

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The appeal purported to be an appeal as of right from an award of the Chief Court of Lower Burma. Some land belonging to the appellants had been taken for public purposes under the provisions of the Land Acquisition Act, 1894. In due course the Collector made his award. The appellants did not accept it. They were dissatisfied with the amount of the Collector's valuation. On that ground and on that ground only they demanded, as they were entitled to do, that the matter should be referred to the Court under the provisions of the Act. The expression "the Court" in the Act is defined as meaning "a principal Civil Court of Original Jurisdiction." The reference was taken by two Judges of the Chief Court. They sat as "the Court" and also as the High Court to which an appeal is given by the Act from the award of "the Court." The hearing of the reference occupied 45 days. More than 100 witnesses were examined. A vast mass of documents was put in and the learned Judges at the request of the parties viewed the premises. Then they made an exhaustive award dealing minutely with the evidence, and they held that the award of the Collector had given the appellants "all and probably more than the full market value of their property," and so they dismissed the reference with costs. They were precluded by the Act from awarding less than the amount awarded by the Collector.

It was admitted by the learned Counsel for the appellants that it was incumbent upon him to show there was a statutory right of appeal. As Lord BRAMWELL, then Bramwell, J. A., observed in the case of the *Sandback Charity Trustees v. The North Staffordshire Railway Company*, (1): "An appeal does not exist in the nature of things. A right of appeal from any decision of any tribunal must be given by express enactment." A special and limited appeal is given by the Land Acquisition Act from the award of "the Court" to the High Court. No further right of appeal is given. Nor can any such right be implied. The learned Counsel for the appellants relied both on section 53 and section 54 of the Act. Section 53 enacts that, "save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure shall apply to all proceedings

(1) 3 Q. B. D., 1,

before the Court under this Act." That enactment applies to an earlier stage in the proceedings and seems to have nothing to do with an appeal from the High Court. Section 54 is in the following terms :—

"54. Subject to the provisions of the Code of Civil procedure applicable to appeals from original-decrees, an appeal shall lie to the High Court from the award or from any part of the award of the Court in any proceedings under this Act."

That section seems to carry the appellants no further. It only applies to proceedings in the course of an appeal to the High Court. Its force is exhausted when the appeal to the High Court is heard. Their Lordships cannot accept the argument or suggestion that when once the claimant is admitted to the High Court he has all the rights of an ordinary suitor, including the right to carry an award made in an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in the course of its ordinary jurisdiction.

It is impossible to conceive anything more inconvenient than that a Court in this country should be called upon to review the determination of arbitrators as to the value of a piece of land in India—a mere question of fact—without the advantage of any local knowledge or the privilege, if it be a privilege, of seeing the cloud of witnesses who engaged the attention of two Judges of the Chief Court of Lower Burma for 45 days, or even the opportunity and the interest of viewing a property the value of which seems so extraordinarily difficult to discover.

A. H. Arnould & Son, Solicitors for the appellants.

Coward & Hawksley, Sons & Chance. Solicitors for the respondent.

J. M. P.

Appeal dismissed.

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June, 24.

KNOX, J.
KARAMAT
HUSAIN, J.

NANDAN SINGH

versus

JUMMAN AND OTHERS.*

Simple mortgage—Estoppel—Denial of mortgagee's right by mortgagor's representatives—Capacity in which right denied—Adverse possession—Trespass against mortgagor—Whether period runs against mortgagee

The representatives of a mortgagor are estopped from denying the mortgagee's title, but it is open to them as *mutawallis* to plead that property was *wagf* and that the mortgage of it was void

Gulzar Ali v. Fida Ali, I. L. R., 6 All., 24, distinguished.

A simple mortgage is not merely a security for the debt but it is a transfer of an interest in the property mortgaged. Hence a trespasser who ousts a mortgagor under a simple mortgage, after the execution of the mortgage, and holds the property adversely to him may by prescription become the owner of the limited estate which the mortgagor had in the property; but such adverse possession cannot extinguish the right of the mortgagee. *Trustees &c, Co v. Short*, 13 A. C., 793; *Smith v. Lloyd*, 9 Ex., 562; *Secretary of State v. Krishnamoni*, 29 Cal., 518; *Ismdar Khan v. Ahmad Husain*, 30 All., 119, referred to. *Ramaswami v. Poma*, 21 M. L. J., 397; *Partab Bahadur v. Maheshwar*, 12 O. C., not approved.

Aindar v. Makhan, I. L. R., 33 Cal., 1015; *Perthasarithi v. Lakshmana*, 21 M. L. J., 467, approved and followed.

Karan Singh v. Bakar Ali, I. L. R., 5 All., 1, P. C., discussed.

SECOND APPEAL from a decree of G. A. Paterson, Esq., District Judge of Benares, confirming a decree of Babu Srish Chandra Basu, Subordinate Judge.

Suit for sale upon a mortgage.

The courts below dismissed the suit.

Defendant appealed.

B. E. O'Connor and *Gokul Prasad*, for the appellant.

Satish Chandra Banerji and *Tej Bahadur Sapru*, for the respondents.

The following judgment was delivered by

* *Karamat
Husain, J.*

KARAMAT HUSAIN, J.—The facts of the case are these:—Kudrat Shah and others, the predecessors-in-title of defendants, 2 and 3, made a simple mortgage of two plots of land with houses and trees, one of which is near Taksal and

* S. A. No. 985 of 1911.

the other near Kabir Chaura, in favour of the plaintiff, on the 5th of July, 1875. They again mortgaged the same property to the same mortgagee on the 12th of March, 1878. One Subhan alleging himself to be the son-in-law of Kudrat Shah, on the 15th of September, 1893, sold the land near Taksal to Musammat Biraiya who made a mortgage of it to Babu Sital Prasad and Bisheshar Prasad on the 22nd of December, 1893. They obtained a decree on their mortgage on the 7th of November, 1900, in execution of which the land was purchased by Ram Dei who built on it a house with a cost of about Rs. 6,000.

The plaintiff on his two mortgages sued on the 4th of May, 1910, claiming Rs. 1,628-6-3. Defendants 1, 2 and 3, as *mutawallis*, pleaded that the property near Kabir Chaura was *waqf* and that the mortgage of it was void. Ram Dei pleaded that the suit relating to the land near Taksal was barred by limitation.

The first court dismissed the suit. Regarding the property near Kabir Chaura the dismissal was based on the unlawfulness of the mortgage of *waqf* property. Regarding the property near Taksal it was based on limitation. The lower appellate court affirmed the decree of the first court.

In second appeal two points are taken :—

(1) The representatives of the mortgagors cannot question the validity of the mortgage, and (2) the adverse possession of a trespasser against a mortgagor is not, in every case, adverse to his simple mortgagee. On the first point I am of opinion that it is open to the representatives of the mortgagors as *mutawallis* to plead that the property was *waqf*, and that the mortgage of it was void. They could be estopped from raising such a plea as representatives of the mortgagors, but as *mutwallis* they cannot be regarded as the representatives of the mortgagors. When the law renders the mortgage of *waqf* property void the mortgagee of such property is presumed to know the law, and if he takes a mortgage of such property he does so at his own risk. *Gulsar Ali v. Fida Ali* ⁽¹⁾ has no application. There a trustee representing the property as his own mortgaged it, and when the mortgagee had got a decree, the trustee sued to

(1) [1883] I. L. R., 6 All., 24.

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recover the property. In these circumstances the trustee was held to be estopped.

There is a conflict of authority on the second point, and before going into the case-law on the subject I deem it fit to set forth the conclusion to which the legal principles lead. Adverse possession in the nature of things is impossible against a person who has no right to possession and hence the legal maxim "*Contra non volentem nulla currit prescriptio*" (Prescription does not run against a person who is unable to act). On the same foundation rests the exposition of law by PARKE, B., quoted by the Lords of the Privy Council in the *Trustees, Executors and Agency Company v. Short* ⁽¹⁾ as follows :—" In the latter case, *Smith v. Lloyd* ⁽²⁾ which was decided in 1854, PARKE, B., in giving the judgment of the Court, says :—

" We are clearly of opinion that the Statute applies not to want of actual possession by the plaintiff but to cases where he has been out of and another in possession for the prescribed time. There must be both absence of possession by the person who has the right and actual possession by the other whether adverse or not to be protected to bring the case within the Statute."

Their Lordships reaffirm the opinion of PARKE, B., in *Secretary of State for India v. Krishnamoni Gupta* ⁽³⁾. They remark :—

" In the case of the *Trustees, Executors and Agency Company v. Short* ⁽⁴⁾, it was laid down by this Board that if a person enters upon the land of another and holds possession for a time and then without having acquired a title under the statute abandons possession, the rightful owner on the abandonment is in the same position in all respects as he was before the intrusion took place," and the opinion of PARKE, B., is there quoted " that there must be both absence of possession by the person who has the right and actual possession by another to bring the case within the Statute."

On the same principle proceeds *Ismdar Khan v. Ahmad Husain* ⁽⁵⁾. The portion of the judgment bearing on the point is as follows :—

" As the defendants wrongfully dispossessed the mortgagees and themselves took possession, their possession was undoubtedly adverse to the mortgagees, and as their adverse possession has continued for a

(1) [1888] L. R., 13 A. C., 793 (2) 9 Exch., 562

(3) [1902] I. L. R., 29 Cal., 518, 535. (4) [1888] L. R., 13 A. C., 793.

(5) [1907] I. L. R., 30 All., 119.

longer period than twelve years, the right of the mortgagees has, under section 28 of the Limitation Act, become extinct and has vested in the defendants. The possession of the mortgagees was not full proprietary possession but was possession of a limited nature. It is this possession of which they were deprived by the defendants; so that the adverse possession of the defendants was also of a limited character and had the effect of extinguishing the limited interests of the mortgagees and vesting those interests in the defendants. The possession of the defendants was not therefore adverse to the plaintiff. There may be cases in which adverse possession against the mortgagee would also be adverse against the mortgagor, for example, where the mortgagor is entitled to immediate possession or where the possession of the trespasser is coupled with a denial of the title of the mortgagor. But as held in *Muhammad Husain v. Mul Chand* (1), following *Chinto v. Janki* (2), possession obtained by the ouster of a mortgagee in possession is not necessarily adverse to the mortgagor also. In the present case it has been found that the title of the plaintiff was never denied by the defendants. It is also an admitted fact that when the defendants took possession the persons entitled to remain in possession were the mortgagees and not the mortgagors and that the mortgage was unsatisfied. As the plaintiff had therefore no right to immediate possession, the defendants cannot be held to have been in possession adversely to the plaintiff. As observed by Mr. Justice MARKBY in *Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee* (3), by adverse possession is meant possession by a person holding the land on his own behalf or on behalf of some person other than the true owner, the true owner having a right to immediate possession. We are, therefore, unable to accept the defendant's contention that their possession is adverse to the plaintiff and that the claim is time barred."

A mortgage under the Transfer of Property Act (Act No. IV of 1882) is "the transfer of an interest in specific immoveable property for the purpose of securing the payment of money." In a simple mortgage therefore an *interest in the property* mortgaged is carved out of the aggregate interests symbolised by the legal term "ownership" and vested in the mortgagee and the *residue* of those interests remains in the mortgagor. This residue may be called "the equity of redemption with possession." A mortgagee under a simple mortgage by virtue of the interest in the property mortgaged which he acquires has the right to bring it to sale for the realisation of the mortgage debt. (Section 67, Transfer of Property Act). Such a mortgage gives him no

(1) [1904] I. L. R., 27 All., 395. (2) [1892] I. L. R., 18 Bom., 51,

(3) [1878] I. L. R., 4 Cal., 327.

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right to take possession of the property mortgaged. The legal position of the parties to a simple mortgage is as follows. The mortgagor owns the equity of redemption with possession and is in possession of the property as a limited owner. The mortgagee owns an interest in the property which entitles him to have the property sold by Court for the satisfaction of the mortgage-debt but has no right to enter into possession of the property. In these circumstances if a trespasser ousts the mortgagor *after the execution of the simple mortgage*, he can take possession of what belongs to the mortgagor and can hold adversely to him to the extent of his limited interest. In other words he can hold the property adversely subject to the liability of being sold for the satisfaction of the mortgage debt. His adverse possession cannot in any way affect the right of the mortgagee to bring the property to sale. Adverse possession of the limited ownership in the property which is all that remains in the mortgagor is not recognised by law as one of the causes which extinguish the mortgagee's right to bring the property to sale. Adverse possession affects rightful possession and such rights as go with it and cannot destroy such rights as are independent of it. A necessary corollary of the above mentioned principles is that a trespasser who ousts a mortgagor under a simple mortgage and holds the property adversely to him may by prescription become the owner of the limited estate which the mortgagor had in the property, but such adverse possession cannot extinguish the right of the mortgagee. This of course happens when adverse possession begins after the simple mortgage. If adverse possession *precedes* the simple mortgage it will run against the mortgagor and the mortgagee both. Similarly, if the mortgagee is entitled to the possession of the property mortgaged, adverse possession will run against him from the date of his right to possession. In two reported cases it has, however, been held that adverse possession against the mortgagor extinguishes the security of the mortgagee.

ABDUL RAHIM, J., in *Ramaswami Chetty v. Poorna Padayachi* (1) took that view. The reasons which led him to it are that the mortgage is only a security for the debt, that the interest in the land remains with the mortgagor that a decree

(1) [1911] 21 M. L. J., 397.

for sale in favour of the mortgagee cannot bind the trespasser, and that *Karan Singh v. Bakar Ali Khan* (1) covers the point. With due respect to the learned Judge a simple mortgage is not *merely a security for the debt*, it is the *transfer of an interest in the property mortgaged* which interest cannot be affected by the adverse possession of a trespasser over the *limited interests of the mortgagor*. No one can doubt the correctness of the proposition that a decree for sale against a mortgagor cannot bind a trespasser who is no party to the decree, but it must not be forgotten that the property which the trespasser acquires is the property which is liable to sale at the instance of the mortgagee, and the adverse possession of the limited estate of the mortgagor is not sufficient to free it from that liability. If a simple mortgage did not create *an interest in the property* in favour of the mortgagee, adverse possession against the mortgagor who would have been the full owner of the property would have extinguished the security. In the case before us the law gave the mortgagee sixty years to enforce his remedy and the ouster of the mortgagor by the trespasser in the absence of statutory provisions to that effect cannot cut it down to twelve years, and force the mortgagee to sue the trespasser in ejectment who may well plead that no suit for ejectment lies and that there is no cause of action for sale against him. *Karan Singh v. Bakar Ali Khan* (2) has no application to the case of adverse possession, which begins *after the execution* of a simple mortgage against the mortgagor. In that case the village Khard Khera was in dispute between Karan Singh on one hand and Kharag Singh and Rudar Singh on the other. The Collector took possession of it as *Kurk tahsil* in April, 1861. The guardian of Kharag Singh and Rudar Singh mortgaged it on the 7th of January and the 6th of October, 1862. Karan Singh obtained a decree for the village, and the Collector delivered possession of it to Karan Singh in October, 1863, making over to him the surplus profits too. In 1874, the mortgagee sued on the mortgages of 1862. Karan Singh pleaded limitation attempting to tack on the Collector's possession which began in April, 1861, to his own.

(1) [1882] I. L. R., 5 All., 1.

(2) [1882] I. L. R., 5 All., 1.

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Their Lordships, ruled that the Collector's possession was not adverse to the owner and could not be tacked on to that of Karan Singh. From this ruling it is sought to be inferred that their Lordships were of opinion that the adverse possession against a mortgagor which begins *after a simple mortgage* is adverse to the mortgagee. They have not expressly so ruled, and to rely on an inference is very dangerous. Moreover, the possession of the Collector in that case began *before the mortgage* and it had been adverse to the mortgagee also inasmuch as the mortgagor at the commencement of adverse possession was not the mortgagor but the absolute owner of the property. In that case the Collector's possession *began before the mortgage*, and the rule that his possession if adverse to the mortgagor was also adverse to the mortgagee, would have been sound law but could not have governed cases in which adverse possession *began after a simple mortgage*. The distinction has been noticed by MUNRO, J., in *Parthasarathi Naikan v. Lakshmana Naikan*⁽¹⁾. He says:—"Had the Collector's possession which began before the mortgage been adverse to the mortgagors and had the defendant claimed through the Collector, then the mortgagee's suit would have been barred as in *Nallamuthu Pillai v. Betta Naikan*⁽²⁾. This supplies a reason why it was considered necessary to consider the question of tacking."

ABDUL RAHIM, J., is also of opinion that the result of holding that adverse possession against a mortgagor does not extinguish the security of his mortgagee "would be that when a property is under mortgage and the mortgagor or his successor-in-interest goes on paying interest on the debt or otherwise acknowledges his liability persons in peaceable and unchanged possession and enjoyment of such property in assertion of their own rights whatever the length of the time during which their possession and enjoyment might have lasted would not be secured in the title." This in his opinion is monstrous. With due respect I am unable to agree with him. I see no reason why the invader of the possession and the limited rights of the mortgagor should be so favoured by law as to acquire the right of the mortgagee also.

(1) [1911] 21 M. L. J., 467.

(2) [1900] I. L. R., 23 Mad., 37.

The other case which is against the view I take is that of *Partab Bahadur Singh v. Maheshwar Singh*⁽¹⁾. In it one of the learned Judges based his decision on what appeared to him to be the view of their Lordships of the Privy Council in the case of *Karan Singh v. Bakar Ali Khan*⁽²⁾. He said :—

“ And it appears to me that in the case of a simple mortgage when the mortgagee is not entitled to possession twelve years' adverse possession against the mortgagor must be held to extinguish the security as far as regards the property held adversely to the mortgagor. This appears to have been the view of their Lordships of the Privy Council in the case of *Karan Singh v. Bakar Ali Khan* (2). ”

I have already explained that the inference sought to be drawn from the case of *Karan Singh* would apply to those cases in which adverse possession against the mortgagor commenced before the mortgage. That ruling does not, therefore, cover those cases in which adverse possession begins after a simple mortgage. The learned Judge gave no other reason for the view he took and no principle favours it. The other learned Judge says :—

“ It will be seen that practically the rulings under both heads are concurrent upon the general principle that a person who is in possession of mortgaged property when there is no priority between him and the mortgagor (like the respondents in the present case) can assert his title as against the mortgagee from the date on which the mortgagee was entitled to take action on his mortgage deed by suing for possession or for sale of the property in case of default.”

With due respect no ruling, so far as I have been able to understand it, lays down that a mortgagee under a simple mortgage who is not entitled to take possession of the property mortgaged is *bound* to sue the trespasser. The following cases are in favour of the view I take. *Aimdar Mandal v. Makhan Lal Day*⁽³⁾ and *Parthasarathi Naickan v. Lakshmana Naikan*⁽⁴⁾. MUNRO, J., in the last named case has with great ability distinguished all the rulings which seem to be in conflict with that view. I fully agree with him and need not repeat what he has so well set out in his judgment.

For the above reasons I would hold that the suit for the enforcement of the two mortgages against the property near

(1) [1908] 12 O. C., 45.

(2) [1882] I. L. R., 5 All., 1

(3) [1906] I. L. R., 33 Cal., 1015.

(4) [1911] 21 M. L. J., 467.

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Husain, J.

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Knox, J.

Taksal, which is in possession of Ram Dei, is not barred by twelve years' limitation.

KNOX, J.—On the former of the two questions raised in this appeal I never had any doubt. I quite agree with what my brother has said on the question.

The second question raised is of more difficulty, but after reading the various authorities and after giving full consideration to the question I agree with my brother in holding that limitation does not bar the claim.

The result is that the decree of the lower appellate court is so far modified that the plaintiff will get a decree for sale of the property situate at muhalla Taksal in the city of Benares, with costs, in proportion to his success and failure in which the fees of this Court will be calculated on the higher scale.

BY THE COURT—The decree of the lower appellate court is modified and the plaintiff will get a decree for sale of the property situate at muhalla Taksal in the city of Benares, with costs in proportion to his success and failure.

Decree modified.

CRIMINAL.

1912.

July, 11.

KNOX, J.

JIWA

versus

KING-EMPEROR.*

Municipalities Act—Powers of Municipal Board to require a person to vacate a shop.

The Municipal Board has no power to require a person to give up his shop situate on land, not belonging to the Municipality, of which such person is lawfully in possession.

CRIMINAL REFERENCE made by W. J. D. Burkitt, Esq., Sessions Judge of Saharanpur.

The facts appear from the order of the Sessions Judge, dated 7th June, 1912.

Cr. Ref. No. 476 of 1912.

The case was submitted to the High Court for orders, under section 438 of the Criminal Procedure Code, by W. J. D. Burkitt, Esq., I. C. S., Sessions Judge of Saharanpur, by the following order :—

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Order of Reference.

In this case and case No. 23, applications have been presented for the revision of an order of the Joint Magistrate of Roorkee, convicting the applicant Jiwa Ram of an offence punishable under section 147 of the Municipalities Act and fining him Rs. 10, and inflicting a further fine of Rs. 3 per day until he complied with a certain order of the Municipal Board of the Hardwar Union, and an order of the Deputy Magistrate of the Roorkee Sub-Division, fining him Rs. 25, for the same offence. The facts, so far as they appear from the record are, that, on the 31st of May, 1911, the Municipal Board passed a resolution, a copy of which is on the record of the case, tried by the Deputy Magistrate, to the following effect. I give the words in full as they are of importance :—

Report Secretary Sahib dar bare dukanat ki jo platform par namazun malum hote hain parhi gai, tajviz hui ki qawaid dar bare mumaneat karne kholne dukanat platform ke kinare par banai jayen.

No rules, so far as the record in either case goes, were framed on this resolution, but apparently the resolution itself was taken as a rule. As a result of this resolution the shop keepers occupying shops along the platform or esplanade fronting the Ganges were required to clear out. At least it is obvious from the circumstances of the case and the judgment of the Joint Magistrate that this was what they were required to do. I mention this because in the course of arguments before me the learned Government Pleader attempted to show that all that was required was that the side of the shop fronting the esplanade should be closed. This, however, is obviously not the case. The wording of the resolution shows this, and Mr. Hobart's judgment clearly shows what the present applicant was punished for, was not vacating his shop. A notice in pursuance of resolution of the 31st of May, 1911, was issued on the 14th of February, 1912. All the other shop-keepers, except the applicant, obeyed the notice and cleared out. In respect of the shop in question the applicant is a tenant of the Rani of Landhaura. She apparently was willing that he should give up the shop and was prepared to remit the rent due for the remaining period of his lease. He, however, as I have already said, declined to obey, with the result that a prosecution was launched against him and he was convicted and fined by the Joint Magistrate on the 16th of March, 1912. In spite of this he still remained recalcitrant and a second prosecution was launched as a result of which he was convicted by the Deputy Magistrate on the 3rd of May. The grounds on which the applicant came to this court in revision are not tenable. The main question that is raised, is the lack of notice as required by law. It is also urged that the applicant had not been given another shop in

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exchange and that for that reason he was not compelled to obey the order. This second ground obviously cannot be relied on. As regards the first, even if it be allowed that sufficient notice was not given to the applicant on the first occasion, there is no doubt that he had ample notice before the second prosecution. In fact it is proved that the Municipal Secretary himself went and served the notice. In arguments before me the application was supported on totally different grounds. By these arguments the validity of the whole transaction was challenged. Before considering this question I may clear the ground by saying that it is an admitted fact that the land and the shop in question are not the property of the Municipality. The question then arises as to the right of the Municipality to require the applicant to vacate the shop. I have searched through the Municipal Act and can find no section under which a Municipal authority is empowered to require a person to give up his shop situate on land, not belonging to Municipality, of which he is lawfully in possession. I have examined the rules of the Hardwar Union and I can find no rule which would justify such an action by the Municipality, and lastly, even supposing it was in the power of the Municipality to make rules such as those foreshadowed by the resolution of the 31st of May, these rules would not come into effect until they had been published in the Gazette and confirmed by the Local Government as laid down in section 133 (2) of the Municipalities Act. Therefore it appears to me that the whole action of the Municipality in this matter has been *ultra vires*, and therefore the applicant has not disobeyed any lawful direction given by the Board. It was suggested in arguments by the learned Government Pleader that the real object is to prevent the applicant and the other shop-keepers who had shops near him, from encroaching on the esplanade, which is admittedly Municipal property. The Municipality has ample powers to prevent this. It is not for an encroachment that the applicant has been convicted and punished. I accordingly am of opinion that the convictions and sentences in these two cases should be set aside, and I accordingly report them under section 438 of the Criminal Procedure Code for the orders of the Honourable High Court.

Knox, J.

KNOX, J.—This case has been properly reported by the Sessions Court of Saharanpur. The order passed under section 147 of Local Act No. 1 of 1900 is illegal. It is set aside. The fine or any portion of it, if paid, will be refunded.

A. C. M.

Reference accepted.

NAWAB KHAN

versus

MOHAMMAD ZAMIN *

Election petition—Practice—Supplying particulars after petition presented—Amendment of plaint.

CIVIL

1912.

July, 16.

RICHARDS, C. J.
TUDBALL, J.

A petitioner questioning the validity of an election is entitled to give evidence of additional cases of misconduct in the course of the election which are mentioned for the first time after the expiration of fifteen days prescribed by the rules for filing the application and the fact that the additional instances are given by means of amendment of plaint makes no difference.

There is nothing in the rule which requires a petitioner to specify all the particulars in the petition and it is enough if the ground mentioned is that the respondent was guilty of personation. The practice in England is to allow particulars of the charges to be furnished after the petition is presented and there is no reason why the same practice should not prevail in India.

SECOND APPEAL from a decree of H. E. Holme, Esq., I. C. S., District Judge of Allahabad, reversing the decree of M. Tufail Ahmad, Second Additional Munsif of Allahabad.

Election petition.

This was a petition by the plaintiff to set aside the election of the defendant as Municipal Commissioner of Allahabad, under rule 42 of the Government Notification No. 2640, published in the Government Gazette, Part III, page 337 of 30th July, 1910.

(Rules framed under section 187, Municipalities Act).

In paragraph 6 of the petition, the plaintiff said, "The plaintiff has come to know from enquiry that (a) fraudulent proceedings were taken and threats were held out, and the defendant, his agents, or friends, made an unauthorized person vote in place of the rightful voter; (b) that, at the defendant's election, certain improper proceedings were taken on his behalf. The names of some of the voters are given at the foot of the plaint. Other names will be given later on after the inspection of the ballot paper." Below this, four instances or particulars of illegal votes were given. This petition was filed within fifteen days of the election as

* S. A. No. 354 of 1912.

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provided by the Government Notification. But after that period was over, plaintiff applied to add six more instances of illegal voting. The learned Munsif granted this application and after recording evidence, set aside the election of the defendant. The defendant appealed to the District Judge who held that the Munsif was not justified in allowing the plaint to be amended and therefore he disregarded the instances of illegal vote subsequently added, decreed the appeal, dismissing the plaintiff's petition.

B. E. O'Connor, for the appellant, submitted that the lower appellate court has mixed up the grounds on which an election petition can be filed, with the instances of illegal votes. The plaintiff was not entitled to add new grounds after the prescribed period but he could add new instances.

[RICHARDS, C. J.—A plaintiff can amend the plaint at any time but he cannot add a new cause of action.]

Cause of action was the malpractice and not the particular instance set up. Instances can be given after filing the petition and before trial.

Rogers on Elections, Vol. III, pp 219-220.

In this case, particulars were given before the first hearing.

[RICHARDS, C. J.—Where a petition is filed on the ground of personation, and long after the period of limitation, a new ground, such as that of bribery, is sought to be added, it would be a different matter.]

Sunder Lal, for the respondent, submitted that procedure in such cases in India was quite different to what it was in England. In England, there was special law on the subject.

[RICHARDS, C. J.—You mean to say that Indian practice is the best.]

That was not for him to say. The local Government was entitled to make rules under section 187 of the Municipalities Act. Those rules had the force of law. The law did not lay down any mode of trial. The local Government could frame rules which it had not done. The only rule on the subject was rule 42 and it laid down that no election could be set aside except on an application within a certain number of days. The rules did not define what was corrupt practice. The present petition made a mention of corruption, undue

influence and personation in a vague manner. If particulars could be supplied later on, those words could be safely used in every case.

[RICHARDS, C. J.—If he could prove none of these except one, it may go against him.]

Here all possible charges were made. Four cases of personation were alleged and six more were proved in evidence. There was no evidence given of anything but personation.

[RICHARDS, C. J.—The only question is whether or not by amendment of plaint, or adducing further evidence, fresh instances can be proved.]

The amendment could only be made within the period in which the original plaint could have been filed.

[RICHARDS, C. J.—This is not a case of amendment.]

According to English practice, a petition was to be filed within a certain number of days of the election and within a certain time after that instances were to be alleged. Further charges, too, were to be made within a certain time. Here all charges and particulars were alleged in the petition. Otherwise, the result would be that we could go on adding fresh particulars every day, and in certain cases it may go on for several months. The petitioner ought to make all allegations within 15 days. Inspection could have been made within this time.

[RICHARDS, C. J.—Can you show me any English case in which it has been held that an instance of bribery could not be added afterwards.]

No, because under the English law, the plaintiff had 28 days from the date of knowledge of an instance of bribery. Giving of further particulars after limitation would amount to filing a fresh petition.

[RICHARDS, C. J.—I think it would be very fair to adopt and follow English practice in such cases. There was no new change put in.]

The judgment of the Court was delivered by

RICHARDS, C. J.—This appeal arises out of an election petition. Nawab Khan was one of the electors at an election

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of the Municipal Board of Allahabad, which was held on the 8th of March, 1911. At that election the respondent, Muhammad Zamin, was declared duly elected. Within fifteen days the present petition, questioning the validity of the election was presented in the court of the Additional Munsif. The grounds for questioning the election are set forth in paragraph 6 of the petition. In clause (a) it is asserted that fraudulent proceedings were taken and threats were held out, and the defendant, his agents, or friends, made unauthorised persons vote in place of rightful voters. Four instances of impersonation were then set forth, and it went on to assert that other names would be given later on after the inspection of the ballot papers. Before the petition was heard the petitioner was in a position to give further cases of personation and the petition was amended by adding the particulars of six additional cases of alleged personation. The learned Additional Munsif heard the case and found that a certain number of cases of personation were proved ; and he accordingly set aside the election.

The respondent appealed to the District Judge. In that court and in this Court it was admitted that personation, to which the candidate or his agents were parties, was a good ground for setting aside an election. The learned District Judge held that the Munsif had jurisdiction to hear the petition, and in this Court it has not been contended—and, in our opinion, could not be contended that the Munsif had not jurisdiction to hear the case. The learned District Judge, however, set aside the decree of the Munsif and dismissed the petition upon the ground that the court had no power to amend the petition by adding the further cases after the expiration of fifteen days from the date of the election. The learned District Judge held that those cases which were originally set forth in the petition were not proved and that therefore the petitioner's case failed.

The only question which we have to decide in the present appeal is whether or not the petitioner was entitled to give evidence of the additional cases which were mentioned for the first time after the expiration of 15 days of the election. Rules have been framed under the Municipalities Act,

section 187, with regard to election petitions. Rule 42 is as follows :—

“The validity of an election made in accordance with these rules shall not be questioned except by a petition presented to a competent court within 15 days after the day on which the election was held by a person or persons enrolled in the Municipal electoral roll.

“Provided that no election shall be called in question on the ground that

“(a) the name of any person qualified to vote has been omitted from, or the name of any person not qualified to vote has been inserted in, the electoral roll or rolls made and revised under rules 1 and 2 of these rules; or

“(b) the name of any person qualified for election as a member of the Board has been omitted from, or the name of any person not qualified for election as a member of the Board has been inserted in, the candidate list is prescribed under rule 3 of these rules.”

This is the only rule relating to election petitions. The learned District Judge says :

“Reading rule 42 it seems to me perfectly plain that the intention of the Legislature is that specific and not general grounds for questioning an election shall be alleged and that those grounds shall all be put forward within 15 days of the election. The two provisos, and the words ‘shall not be questioned except by petition presented within 15 days’ seem to place this beyond doubt. It would stultify the section if a petitioner were allowed to allege general corruption and then add specific instances to his plaint at leisure as he gathered material.”

In the present case the petitioner alleged that the respondent had been guilty of misconduct in the course of the election by procuring persons to personate dead or absent voters. That was the ground of the petition. The particular instances of personation are quite another matter and in our judgment it was quite open to the petitioner to furnish those particulars after the expiration of the 15 days. What the court had to guard against was the respondent being taken by surprise by the petitioner keeping back the particulars until the last moment. It seems to us perfectly clear that there is nothing in the rule which requires that all the particulars should be specified in the petition. In many cases, and probably in the present case, it would have been impossible for the petitioner to have furnished all these particulars within 15 days. The practice in England with regard to elections is to allow particulars of the charges to be given

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after the petition is presented ; and we see no reason whatever why the same practice should not prevail here in the absence of clear rules on the point. The court will always have it in its power to prevent any abuse of the process of the court by insisting that proper particulars shall be furnished to the respondent in ample time to enable him to meet the charges. The mere fact that the additional particulars were given by means of amending the plaint is in our opinion no reason why we should hold that the petitioner was not entitled to go into evidence and prove the additional cases.

We allow the appeal, set aside the decree of the learned District Judge and remand the case to his court with directions to re-admit the appeal under its original number on the file and to proceed to hear and determine the same according to law, having regard to what we have stated above. The appellant will have his costs in this Court. Other costs will be costs in the cause.

V. M.

Appeal decreed—Cause remanded.

CRIMINAL.

1912.

July, 18.

KNOX, J.

LALTA PRASAD

versus

KING-EMPEROR.*

Criminal Procedure Code (Act V of 1898), section 195 (c)—Sanction to prosecute for forgery—Offence before any proceeding—No sanction required.

By section 195, clause (c), Criminal Procedure Code, courts are prohibited from taking cognizance of an offence described in section 463, Indian Penal Code, when such offence has been committed by a party to any proceeding in any court in respect to a document produced or given in evidence in any such proceeding. The section does not remove from the cognizance of criminal courts an offence described in section 463 when such an offence has been committed by an ordinary individual. As long as the prosecution is confined to offences connected with a document committed prior to its production in court, such prosecution is within the law and requires no sanction. Sanction is required for offences committed by a party to a proceeding in any court in respect to a document produced or given in evidence in such proceeding.

CRIMINAL REVISION of an order of P. U. Allen, Esq., District Magistrate of Bareilly, directing the prosecution of the applicant.

* Cr Rev. No. 374 of 1912

The facts were as follows :—Lalta Prasad applied for compulsory registration of a sale-deed in his favour. The deed was registered on 8th September, 1911. It was afterwards discovered that certain entries in the deed had been tampered with prior to the registration. The Registrar brought the matter to the notice of the District Magistrate, who passed this order, "There is a strong *prima facie* case of forgery. I direct prosecution of Lalta Prasad.....". Proceedings were commenced. Before this a civil suit was brought by the executant of the deed against Lalta Prasad for declaration that the deed as registered was forged. An application was then made to the criminal court for staying its proceedings pending the decision of the civil court. It was refused and some evidence for the prosecution was taken. Lalta Prasad then applied in the High Court for revision of the order of the District Magistrate directing the prosecution.

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Gulzari Lal (*Mr. Alston* with him), for the applicant :—The prosecution is bad in law. It contravenes the provisions of section 195 (c) of the Criminal Procedure Code. A proceeding in respect of the document alleged to have been forged is pending in the civil court, and Lalta Prasad is a party to that proceeding. Hence, no criminal court can take cognizance of the offence of forgery alleged to have been committed by Lalta Prasad in respect of that document except with the sanction or on the complaint of that civil court or some other court to which it is subordinate. The District Magistrate had no jurisdiction to sanction or direct the prosecution.

[KNOX, J.—But the forgery, if committed, was committed long before any proceeding in the civil court was started. It is not alleged that the forgery was committed during the pendency of those proceedings; so, no sanction or complaint by the civil court is necessary in the present case.]

To hold so would be to very much limit the operation of section 195 (c). No such limitation appears in the section itself. Then, no charge has yet been framed, and it is not known whether the charge against the applicant will be one of forgery or of uttering a forged document. The latter charge can, at all events, not be taken cognizance of without the sanction of the court in which the forged document is produced.

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Knox, J.

R. Malcomson, Assistant Government Advocate, for the Crown, was not called upon.

The following judgment was delivered by

KNOX, J.—A forgery is alleged to have been committed with reference to a deed of sale. From the deed it would appear that if a forgery was committed, it was committed on or about the 8th of September, 1911. At that time no proceedings were pending with reference to this particular document. The District Magistrate of Bareilly has, by an order, dated the 16th of February, 1912, directed the prosecution of Lalta Prasad for forgery and has made the case over to one Mr. Karar Husain, for hearing. An objection is raised to this order based upon section 195, clause (c) of the Code of Criminal Procedure.

It is true that the Magistrate has not stated under what section he has directed the prosecution, but a prosecution for forgery would ordinarily run under section 463 of the Indian Penal Code. As I read section 195, clause (c), courts are prohibited from taking cognizance of an offence described in section 463 when such offence has been committed by a party to any proceeding in any court in respect to a document produced or given in evidence in any such proceeding. The section does not remove from the cognizance of Criminal Courts an offence described in section 463 when such an offence has been committed by an ordinary individual. Suppose, for instance, this very document had never been put into the civil court and suppose further that it is a forgery—is the person who forged it to be free from all prosecution? I do not by this mean to say that I have any reason for saying this document is a forged document, I know nothing about it. As long as the prosecution is confined to offences connected with this document committed prior to its production in court, such prosecution is within the law and requires no sanction. Sanction is required for offences committed by a party to a proceeding in any court in respect to a document produced or given in evidence in such proceeding.

I find no reason for interfering and dismiss the application.

B. K. M.

Application dismissed.

NARAYAN DAS AND ANOTHER

versus

THE EAST INDIAN RAILWAY COMPANY,
CALCUTTA.**Railways Act (Act IX of 1890), section 75—Loss of silver goods—
Goods not insured—Liability of the Railway Company.*

CIVIL,

1912.

July, 25.

RICHARDS, C.J.
BANERJI, J

The plaintiffs consigned some packages from Bombay to Allahabad where they were delivered to them minus one silver bar which was found to have been stolen between Jubbulpore and Allahabad. The contents of the package were not declared and insurance fee was not paid. *Held* that the loss of silver was a loss within the meaning of section 75 of Railways Act, and the plaintiffs not having declared the value and paid the percentage mentioned in the section, could not hold the Company responsible for the loss.

SECOND APPEAL from a decree of H. E. Holme, Esq., District Judge of Allahabad, reversing a decree of Pandit Guru Prasad Dube, Subordinate Judge.

Satish Chandra Banerji and *Damodar Das*, for the appellants.

B. E. O'Conor and *Ladli Prasad Zutshi*, for the respondents.

The judgment of the Court was delivered by

RICHARDS, C. J.—The facts connected with this appeal are shortly as follows:—Plaintiffs or their agents consigned certain bars of silver for delivery at Allahabad to the G. I. P. Railway Company at Bombay. The G. I. P. Railway Company delivered the box intact to the East Indian Railway at Jubbulpore. When the box was delivered to the plaintiffs or their agents at Allahabad, it was found that one silver bar was missing, valued by the plaintiffs at Rs. 2,044-12-0. There can be no doubt that the silver bar was stolen in the course of its transit between Jubbulpore and Allahabad, either by one or more of the Company's servants or by an outsider. As to how it was stolen there appears to be no evidence. Section 75 of the Railways Act of 1890 provides

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that "when certain articles mentioned in the Schedule II are contained in any parcel or package delivered to the Railway for carriage, and the value of such articles exceeds Rs. 100, the Railway shall not be responsible for the loss, destruction, or deterioration of the parcel or package unless the person sending or delivering the parcel or package to the Railway caused its value and contents to be declared * * * and if so required by the Railway Company pay or engage to pay a percentage on the value so declared by way of compensation for increased risk." In the present case the plaintiffs or their agents signed a risk note which shows clearly on the face of it that they had been required to pay an increased percentage on the value but had elected not to do so. This being so, the only question which arises in the appeal is whether or not the silver can be said to have been 'lost' within the meaning of the section. It is contended that it would not be lost unless the actual way in which the silver was stolen was proved by the Railway Company. In our opinion this argument has no force whatever. As already stated, it is absolutely clear from the admitted facts that the silver bar was stolen whilst in transit between Jubbulpore and Allahabad. The package was delivered in fact at Jubbulpore and one bar was missing when it was delivered to the plaintiffs or their agents at Allahabad. In our opinion this was a loss within the meaning of section 75. The case of *Hearn v. The London and South Eastern Railway Company* ⁽¹⁾ is cited on behalf of the appellants. This case turned upon an argument as to the sufficiency of a plea. In that case the declaration alleged that the particular goods had not been delivered through the negligence of the Railway Company, but there was no allegation that the goods had been lost. A perusal of the judgment in the case clearly shows that if it had been alleged that the title deeds had been actually lost while in transit in the Railway Company, the plea of the defendants would have been a good plea.

It has also been argued that the risk note cannot save the defendant unless they show that they took proper care of the package consigned to them. In our opinion the present case does not turn upon the construction of the

(1) 10 Ex. C., 793.

risk note at all. The article was clearly one of the articles mentioned in the Second Schedule and the consignor was bound to declare the value of the article and to pay the percentage mentioned in the section so as to hold the Railway Company responsible for the loss.

In our opinion the appeal fails and is dismissed with costs.

Appeal dismissed.

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Company,
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Richards, C. J.

LALA

versus

NAHAR SINGH *

*Agra Tenancy Act (II of 1901), Local, section 22—Lineal descendant—
Adopted son.*

CIVIL.

1912.

July, 31.

RICHARDS, C. J.
BANERJI, J.

An adopted son in the eye of the Hindu law has just the same rights as a natural born son, and is a lineal descendant within the meaning of section 22 of the Agra Tenancy Act.

SECOND APPEAL from a decree of A. W. R. Cole, Esq., Additional Judge of Aligarh, confirming a decree of Pandit Suraj Narain Majju, Munsif of Bulandshahr.

Suit for possession.

The facts of the case are as follows :—

This is a suit to recover possession of certain occupancy holding detailed in the plaint, left by Siya Ram, plaintiff's brother, who is said to have died childless about 8 months before the filing of the suit. It is said that under section 22 of Act II of 1901, the said holding devolved on the plaintiff, but the defendant who is the daughter's son of the said Siya Ram, professing himself to be the adopted son of Siya Ram, caused his name to be recorded in the Revenue papers, that the defendant was not in fact and could not have been legally adopted.

The plaintiff, therefore, besides the holding, seeks possession of the house also which has been left by Siya Ram. It is

*S. A. No. 1187 of 1911.

CIVIL.

1912.

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v.

Nahar Singh.

said by the plaintiff further that the plaintiff's objection in the Revenue court was summarily dismissed.

The courts below dismissed the suit.

Plaintiff appealed.

Tej Bahadur Sapru, for the appellant.

The respondents were not represented

The judgment of the Court was delivered by

Richards, C. J.

RICHARDS, C. J.—We think that the court was quite justified in finding that the deceased occupancy tenant, Siya Ram, was a Sudra, and could adopt a daughter's son. This being so, the only question which remains is whether or not an adopted son is a lineal descendant within section 22 of the Tenancy Act, and in our opinion he clearly is. An adopted son is in the eye of the Hindu law just the same as a natural born son. The appeal fails and is dismissed but without costs, as no one appears on behalf of the respondents

Appeal dismissed.

CIVIL.

1912.

August, 3.

PARBATI

versus

BAIJNATH PATHAK AND ANOTHER.*

RICHARDS, C. J.
BANERJI, J.

*Registration Act—Document registered under the provisions of the Act—
Gift—Complete when registration effected*

A document registered in accordance with the provisions of the Registration Act is a registered instrument, and if the document is duly registered in accordance with those provisions the gift is complete and valid.* The law does not require that the registration should be at the instance of or with the consent of the donor

Judgment of CHAMIER, J., 9 A. L. J. R., 300, affirmed.

APPEAL under section 10 of the Letters Patent, from a judgment of Mr. Justice CHAMIER (differing from Mr. Justice KARAMAT HUSAIN), reported in 9 A. L. J. R., 300, confirming

* L. P. A. No. 38 of 1912

a decree of J. H. Cuming, Esq., District Judge of Jaunpur, who confirmed a decree of Mr. Bihari Lal Mah, Munsif.

M. L. Agarwala, for the appellant.

Nawab Muhammad Abdul Majid, for the respondents.

The judgment of the Court was delivered by

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RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiff sought to set aside a deed of gift executed by her. She based her claim upon undue influence and fraud. The courts below, however, have found against her upon these grounds. It was contended, however, on her behalf that the deed was not registered at her instance, or with her consent, and that registration was brought about compulsorily. The sole question to decide, therefore, is whether or not it is necessary in order that there should be a valid gift of immoveable property not only that the instrument should be duly executed and attested in the manner provided by section 123 of the Transfer of Property Act, but also that the registration should be either at the instance of or at least with the consent of the donor. The section merely provides that the gift should be effected by an instrument executed by the donor, attested by two witnesses and registered. In our opinion a document registered in accordance with the provisions of Registration Act is a registered instrument, and if the document is in fact duly registered in accordance with those provisions the gift is complete and valid. The law does not require that the registration should be at the instance of or with the consent of the donor. The appellant relies upon the case of *Rama Miriha Ayyan v. Gopala Ayyan* ⁽¹⁾. It is true that the learned Judges in that case held that it was necessary that the document should be registered with the consent of the donor. They say, “We are further of opinion that a deed of gift being a voluntary transfer remains *nudum pactum* until the donor has done all that is necessary to make it legally complete.” We do not quite understand what the learned Judges meant by saying that “the transfer remained *nudum pactum* until the donor had done all that was necessary to make it legally complete.” The transaction remained *nudum pactum* even after registration, that is to say, there was

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(1) [1896] I. L. R., 19 Mad., 433.

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no consideration for it. It was a voluntary transfer. It must be remembered too that at the time this suit was instituted nothing remained for the donor to do. She had executed the deed in the presence of two witnesses and the donee had had the document registered in accordance with the provisions of the Registration Act. Of course, if the plaintiff could have proved that she was induced to execute the deed by fraud or undue influence, this would be a good ground for setting the document aside quite irrespective of whether it was registered or unregistered. In our opinion the judgment of our learned brother CHAMIER was correct. We dismiss the appeal with costs.

Appeal dismissed.

BUDDHA SINGH AND OTHERS

versus

LALTU SINGH AND ANOTHER.*

Hindu law—Inheritance—Mitakshara—Great-grandson of the grandfather—Grandson of the great-grandfather.

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July, 6.

BANERJI, J.
PIGGOTT, J.

The author of the *Mitakshara* has generally used the word *putra*, wherever it occurs, in the sense of including two immediate descendants of the son in the direct line. The word *putra* used in the *Mitakshara* includes the grandson also. *Kalian Rai v. Ram Chandra*, 1. L. R., 24 All., 128; *Rachava v. Kalingapa*, 1. L. R., 16 Bom., 716, applied.

The line of descent is not limited to two descendants only in the case of the father and the grandfather.

According to the *Mitakshara* law the three descendants of the father being nearer *sapindas* than the three descendants of the grandfather and the three descendants of the latter being nearer than the three descendants of the great-grandfather, the three descendants of the father inherit before the descendants of the grandfather and his three descendants inherit before those of the great-grandfather. The great-grandson of the grandfather is therefore a preferential heir as against the grandson of the great-grandfather.

FIRST APPEAL from a decree of Babu Gauri Shankar, Subordinate Judge of Moradabad.

Suit for possession of property.

The facts of the case are set out in the judgments. The question for decision was whether, under the Hindu law as prevailing in these provinces, the great-grandfather's grandson succeeds in preference to the grandfather's great-grandson.

• *Sundar Lal* (with him *Moti Lal Nehru*), for the appellants :

The conclusion of the court below that the great-grandson of the grandfather is, under the *Mitakshara*, to be preferred as an heir to the grandson of the great-grandfather is opposed to Hindu law.

The text of Yajnavalkya, II, 136, has been correctly expounded by Mandlik at pp. 220, 377-8, and 380-4 of his translation. The passages of the *Mitakshara* which have to be

* F. A. No. 249 of 1910.

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considered are ch. II, section 4, pl. 1, 7 and section 5, pl. 1, 4, 5. अपुत्रस्य means "of one without male issue", तत्पुत्राः means "their sons" and *not* "their descendants", and सन्तान means only such descendants as are entitled to inherit and are mentioned before. The great-grandson is nowhere mentioned.

The following authorities support the appellants, *viz.*—

J. C. Ghose, *Hindu Law*, 125, 127.

West and Bühler, *Hindu Law*, 124, 114, 116.

J. N. Bhattacharyya, *Hindu Law*, 448.

S. C. Sircar, *Vyavastha Chandrika*, vol. I, 178, 183, 204

R. K. Sarvadhikari, *Hindu Law of Inheritance*, 423, 435.

Madanaparijata (Sitaram Sastri's translation), 22.

G. C. Sarkar, *Hindu Law*, ed. 4, 290.

Rumsey, *Chart of Inheritance*, 43.

Macnaughten, *Hindu Law*, 28.

Colebrooke, *Digest of Hindu Law*, vol. II, 542, pl. 417.

Viramitrodaya (Setlur's translation), 420-3.

The court below relies upon

Kalian Rai v. Ram Chandra, [1901] I. L. R., 24 All., 128.

But this case lays down no general principle and is in the teeth of all authorities. It is criticised in

G. C. Sarkar, *Hindu Law*, 288

The law is exhaustively discussed in

Chinna Sani v. Kunja, [1911] 21 M. L. J. R., 856,

and this decision supports me.

Madan Mohan Malaviya (with him *Satish Chandra Banerji* and *Tej Bahadur Sapru*), for the respondents:—

The general rule is laid down by Manu, IX, 186-7. Three generations are in the line of heirs.

Mandlik's translation of Yajnavalkya, II, 135-6, is not correct; च and एव have not been translated at all, and तथा should have been connected with भ्रातरः. The most important word used is अपुत्रस्य and it cannot be disputed that the word पुत्र here includes the great-grandson.

Mandlik, *Yajnavalkya*, 222.

The *Mitakshara* does not mention the great-grandson specifically (ch. I, pl. 3), but the Viramitrodaya supplies the omission. The list of heirs in the older authorities is only

illustrative, and not exhaustive. Consequently the omission to mention any particular heir does not imply his exclusion. The daughter's son, *e. g.*, is not mentioned in Yajnavalkya's text. Sanskrit has a convenient word पित्रव्य for the paternal uncle, but no similar word to denote the brother of the grandfather or the great-grandfather, and that is why the texts are not more specific.

The *sapinda* relation ends at the seventh degree and in *Mitakshara*, s. 5, pl. 5, the line is traced "up to the seventh degree in ascent."

Manusmriti, V. 60.

J. C. Ghose, *Hindu Law*, 41, 57, 58, 65-6, 78, 97, 169, 170, 183-4.

The texts of Devala and Parasara cited by J. C. Ghose show that up to three generations downwards there is an *identity* of body. If the appellant's contention were adopted, the great-grandson would find no place among *sagotra sapindas*. Yajnavalkya had to indicate the entire range of inheritance in one *anustupa* couplet and he used सत्सुताः to denote the issue generally. The *Mitakshara* uses the word पिहृसन्तान to indicate the *line* of the father. सन्तान is interpreted as 'continuation' in

Rachava v. Kalingapa, [1892] I. L. R., 16 Bom., 716, 719.

Mandlik's authorities as cited on p. 360 (Subodhini) and p. 364 (Viramitrodaya) are both wrong. Mandlik has erred in thinking that only ten heirs are indicated. Harrington took a more correct view, though he should have stopped at the fourth degree and not counted up to the seventh. Neither abstraction, *vis.*, obstructed or unobstructed inheritance, can be the antecedent of सत् पुत्रः, but it refers to son, grandson, uncle and brother (पितृव्यदि). "And the like of the son" is not in the original. "Of sons and other descendants of others" is mentioned here. This is supported by the Subodhini, which has पुत्रपौत्रादयः. There is no justification to limit आदि in the way Mandlik limits it. His suggestion too regarding error in the passage cited from the Subodhini is not justified.

Setlur, *Mitakshara*, 590, l. 8.

The Subodhini is commenting on the *Mitakshara*, ch. I, s. 1, pl. 3. एव सत् पुत्रादिषु अपि रुहनीय applies to both obstructed

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and unobstructed heritage. The word पुत्र includes a great-grandson. Why should the *Mitakshara* repeat the same thing over and over again? पुत्रपौत्रकमेव is the ordinary idiom. Where the Subodhini is in conflict with the *Mitakshara*, it must be rejected. No reason has been suggested why पिहृसन्तान should be limited to the son. As to the meaning of the words सन्तान, सन्तति, and स्रु, see

Savda Kalpadruma, p. 2293,

M. Williams, *Sanskrit-English Dictionary*, 1057, 1118,

Amarkosha, II, 7 (Colebrooke's translation, p. 175).

The case-law supports the respondents :—

Rutchputty Dutt v. Rajunder Narain, [1839] 2 M. I. A., 132, 157.

Bhyah Ram Singh v. Bhyah Ugar Singh, [1870] 13 M. I. A., 373, 392, 393.

Kureem Chand v. Oodung Gavaid, [1866] 6 W. R., 158.

Mt. Oorhya Koer v. Rajoo Nye, [1870] 14 W. R., 208.

Kashu Bai v. Sita Bai, [1911] 13 Bom., L. R., 552, 557.

Radhey Singh v. Jholee Singh, [1885] S D. A. (Bengal), 384, at 396.

The 24 All. case was correctly decided, and 21 M. L. J. R., 856, can be distinguished and goes too far.

Modern writers also support the respondents' contention.

Sarvadhikari, *Hindu Law of Inheritance*, 654, 656.

S. C. Sircar, *Vyavastha Chandrika*, Vol. 1, 183.

J. N. Bhattacharyya, *Hindu Law*, 444, 447-8.

J. C. Ghose, *Hindu Law*, 126, 146.

Mayne, *Hindu Law and Usage*, 777.

A liberal construction should be adopted.

Gridharilal v. Bengal Govt, [1868] 12 M. I. A., 448.

The Dayabhaga (Setlur's translation), p. 97, was also referred to, and reliance was placed upon

Apararka, S. Aiyar's translation, 41.

Where a question of priority arises funeral oblations should also be considered.

Suba Singh v. Sarfras Kunwar, [1896] I. L. R., 19 All., 215.

Sundar Lal, in reply :

Apararka is no authority in the Benares school and cannot override the *Mitakshara*.

I do not say that the defendant (great-grandson) is not an heir ; but he comes under the omnibus clause.

K. L. Sirkar, *Mimansa Rules of Inheritance*, 207.

What is true of lineal succession cannot be true of collateral succession, because the doctrine of representation does not apply to the latter. Logic is out of place where specific texts have to be applied. If "son" includes grandson, then a daughter's grandson should come in immediately after the daughter's son. In *Mitakshara*, ch. II, s. 4, pl. 7, सुतः means a son and not a grandson. A Hindu would prefer that his property should go to his grandmother and not to a brother's grandson who might be a baby. *Mitakshara*, ch. II, s. 5, pl. 2, expressly prohibits the interposition of heirs between the brother's son and the grandmother. The word उत्कर्षे shows that the more excellent or preferable rule would be to give her a place immediately after the brother's son. The "compact series of heirs" ends with the latter.

The brother's grandson is not in the "compact series," and is therefore only a gentile.

Viramitrodaya (Sarkar's translation), 196, 199.

K. L. Sirkar, *Mimansa Rules*, (T. L. L.), 357, 358.

General rules refer to the class previously mentioned in detail.

Madanaparijata (Sastri's translation), 22.

You can come down two steps, but no more.

Sarvadhikari, *Hindu Law of Inheritance*, 510.

Gentiles are of three classes, viz., *sapindas* enumerated and unenumerated, and *samanodakas*.

Smritichandrika (Iyer's translation), 188

Apararka is no authority outside Kashmir.

J. C. Ghose, *Hindu Law*, 11.

Sarvadhikari, *op. cit.*, 381.

The connection with the fifth descendant stops for purposes of funeral oblations. There is no middle course, one must go up and go down to the seventh degree or not at all.

The great-grandson comes in under *Mitakshara*, ch. II, s. 1, pl. 3.

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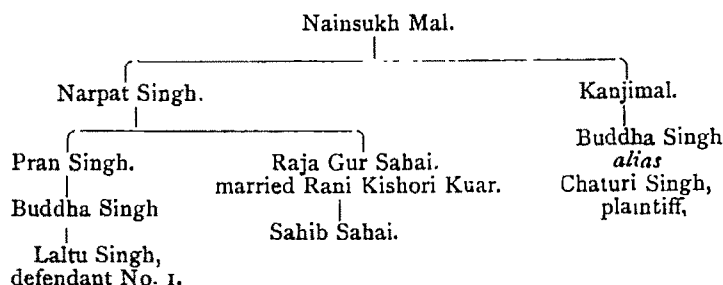
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The following judgments were delivered :—

BANERJI, J.—This appeal raises an important question as to the order in which according to the Benares school of the *Mitakshara* law, *gotraja sapindas* succeed. The first plaintiff claims the estate of Sahib Sahai as his next heir under the following pedigree :—



The correctness of this pedigree is not admitted on behalf of the defendants, but the case has been decided by the court below on the assumption that it is correct, and the appeal before us has been argued on the same assumption.

The last male owner of the property in dispute was Sahib Sahai. After his death his mother, Rani Kishori Kunwari, was in possession till her death in 1907. It is claimed on behalf of the plaintiff, Buddha Singh *alias* Chaturi Singh, that he being the grandson of the great-grandfather of Sahib Sahai, the last owner, has a preferential right of inheritance as against Laltu Singh, the great-grandson of Sahib Sahai's grandfather. The other plaintiffs are purchasers of part of the property from Buddha Singh and are apparently financing the litigation.

The question to be determined is whether under the Hindu law as prevailing in these provinces, the great-grandfather's grandson succeeds in preference to the grandfather's great-grandson. The question is not free from difficulty and the authorities are to some extent conflicting.

The *Mitakshara* bases the order of succession on failure of sons and their descendants on the following text of Yajna-
valkya :—

“ The wife, and the daughters also, both parents, brothers likewise and their sons, *gotraja* (gentiles), *bandhu* (cognates), a pupil and a fellow-student. On failure of the first among these, the next in order is indeed

heir to the estate of one, who departed for heaven leaving no male issue" (*aputrasya*). (Chap. II, S. I, paragraph 1.)

In section IV of chapter II the author of the *Mitakshara* deals with the rights of brothers, and section V lays down the rule of "succession of kindred of the same family name, termed *gotraja* or gentiles." In paragraph 1 it is stated that the *gotraja* (gentiles) are the paternal grandmother and relations connected by funeral oblations of food and libations of water (*sapinda* and *samanodaka*). Paragraphs 4 and 5 are as follows :—

4. "*** Here on failure of the father's descendants (*santan*) the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons."

5. "On failure of the paternal grandfather's descendants (*santan*) the paternal great-grandmother, the great-grandfather, his sons and their sons inherit. In this manner must be understood the succession of kindred belonging to the same general family till the seventh degree among the *sapindas*."

The above is the translation of the original given in Setlur's Hindu Law Books on Inheritance and is more accurate than Mr. Colebrooke's translation.

Relying on the above text the learned advocate for the appellant contends that in the ascending line of heirs the paternal grandfather, and his son and grandson, after the father, his son and grandson, and that after the paternal grandfather's descendants mentioned above, the paternal great-grandfather, his son and grandson come in, that is to say, the heirs are the paternal grandfather and his two descendants, and after them the great-grandfather and his two descendants, and the great-grandson of the paternal grandfather only comes in as a *gotraja sapinda* under the last clause of paragraph 5. On the other hand, it is urged that the word 'son' in the above texts includes the grandson and great-grandson, that the words *santan* must be taken to include three descendants, and that in computing the heirs in the ascending line three descendants of each ancestor should be computed. The former contention has for its support, besides the literal words of the texts of the *Mitakshara*, the opinion of Biseswar Bhatt, the author of the Subodhini, and the Madan Parijat among commentators, and of Mr. Mandlik and Mr. Golap Chandra Sarkar among modern writers, whilst the latter contention is favoured by

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the authority of Apararka and Vaijayanti among commentators, and of Dr. Jolly, Mr. Mayne, Professor Sarbadhikari and other modern writers to whom I shall presently refer in detail. I leave out of consideration the commentators who are of high authority in the Maharashtra and Dravida schools of the *Mitakshara* law and do not carry much weight in these provinces. The *Virmitrodaya*, which next to the *Mitakshara* is of paramount authority in the Benares school, does not discuss the question but simply repeats the words of the *Mitakshara*.

The question thus turns on the interpretation of the words *santan* and *putra* in paragraphs 4 and 5 of the *Mitakshara* cited above, that is to say, whether by *santan* in paragraphs 4 and 5 is meant the descendants specifically mentioned in the preceding paragraphs and the word *putra* is to be taken in the narrow sense of 'son' and does not include the grandson. The appellant contends that the enumeration of heirs given in the above paragraphs should be strictly followed and that after the son of the paternal uncle comes the line of the paternal great-grandfather. He says, as stated above, that the paternal uncle's grandson is a *gotraja* only under the last portion of paragraph 5.

It may be taken as settled that the enumeration of heirs in the *Mitakshara* is not exhaustive. We have, therefore, to consider whether the word "son" is to be taken in the narrow sense contended for and whether in the case of each ancestor in the ascending line only two descendants are to be computed.

The word *putra* has, it seems to me, been understood in a wide sense. In the text of Yajnavalkya beginning with *patni* (wife), &c., cited above, the word at the end is *aputrasya*. That the word *putra* is used by him in an extended sense and is not limited to the son but also includes the son's son and the son's grandson is manifest. This is admitted by Mr. Mandlik on p. 222 of his work on Hindu Law. In the translation of the text itself he has retained the word *putra* and in the note relating to it he says,

"The word *putra* in this verse stands for son, son's son, son's son's son."

He refers to the *Viramitrodaya* and *Balambhatta* as authorities for this interpretation. This is also in accordance with

what Manu ordains (chap. IX, v. 187, Sacred Books of the East, vol. XXV, p. 366), in the following text :—

“To three ancestors water must be offered, to three funeral cakes must be given, the fourth descendant is the giver of oblations, the fifth has no connection.”

So that the participation of the body extends to the fourth descendant including the *propositus*. To the same effect is the following text of Devala :—

“Up to the third degree the members of the family are of the same body.” (Ghose's Hindu Law, 2nd edition, p. 97.)

Parasara says that—

“The separation of the body accrues to the fifth person born of one's family.” (Ghose, p. 57.)

Jimutvahana, quoting Manu, Vishnu, Harita, Yajnavalkya, Sankha, and Likhita, says that,

“The term *putra* stands for descendants up to the son's son's son”. (Mandlik's Hindu Law, p. 381.)

Vijnaneswara, the author of the *Mitakshara*, has also used the word *putra* in the same sense. In chapter I, section I, paragraph 3, treating of obstructed and unobstructed inheritance, he says with reference to sons and grandsons, &c., that the rule should be “inferred in respect of *their* sons.” Both Balambhatta and the author of the Subodhini are of opinion that word ‘their’ (*tat*) in the above passage refers to the grandson, &c., so that the grandson includes the great-grandson. Again, chap. II, section I, of the *Mitakshara* is headed “Right of the widow to inherit the estate of one who leaves no *putra* (*aputrasya*).” There can be no doubt that the word *putra* here also includes the grandson and the great-grandson. Similarly, in section 4 of the same chapter the word seems to have an extended meaning, so that the author of the *Mitakshara* has generally used the word *putra*, wherever it occurs, in the sense of including the two immediate descendants of the son in the direct line. There is apparently no reason for holding that he has used the same word in a restricted sense in section V, paragraphs 4 and 5. It seems that having used the word *putra* in other places in an extended sense he considered it unnecessary to state that he did so in the chapter in question also.

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The view contended for will, it seems to me, militate against the general scheme of succession laid down in the *Mitakshara*. In the case of the owner himself, his son, grandson and great-grandson succeed one after another, that is, down to the third degree. They take before the parents and therefore it is reasonable to conclude that the same rule applies to the descendants of the father and the grandfather. There is apparently no reason to limit the line of descent to two descendants only in the case of the father and the grandfather, and it does not seem that the author of the *Mitakshara* intended to do so. If such was his intention one would expect that he would state some reason for putting a restricted meaning on the word *putra* in the case of the father, the grandfather and other ascendants, although that word had been elsewhere used by him in the sense of including the grandson. Under the *Mitakshara sapinda* relationship depends on participation in particles of the same body and propinquity is the rule of inheritance. It is to the nearest *sapinda* that the inheritance goes. Therefore the three descendants of the father being nearer *sapindas* than the three descendants of the grandfather, and the three descendants of the latter being nearer than the three descendants of the great-grandfather, the three descendants of the father inherit before the descendants of the grandfather and his three descendants inherit before those of the great-grandfather. This is perfectly consistent with the rule of the *Mitakshara*. If Vijnaneswar intended to lay down a different rule, he would not have used the word *santan* in paragraphs 4 and 5 of section V. That word has a wide meaning, and in the English translation of Amarkosh its equivalent is 'lineage, race.' The use of that word may fairly be regarded as an indication of the idea that the descendants of the father and the grandfather, &c., are not to be limited to two degrees only but should include the great-grandson, who is the last man in the series of those who are of the same body, according to Manu and other ancient Hindu law-givers.

The learned advocate for the appellant chiefly relies on the position which he contends is given in the *Mitakshara* to the grandmother, that is, immediately after the brother's son, and he urges that the persons mentioned by name are indi-

cated as the heirs who would come in after the paternal grandmother. As to this it seems to be extremely doubtful whether the author of the *Mitakshara* intended to bring in the paternal grandmother after the brother's son and before his grandson. In paragraph 2 of section V he was considering the question whether the grandmother would come in immediately after the mother. He expressed the opinion that she does not do so, that her place in the order of inheritance is after the compact series of heirs from the father to the brother's son and "that the highest place which can be assigned to her (*utkarshe*)" was after the brother's son. If this placitum be read with the general context and be considered in connection with the whole scheme of succession according to the *Mitakshara* and with the meaning of the word "*putra*" as understood in other chapters, it would not, in my opinion, support the appellants' argument to the extent contended for, and the grandmother would inherit after the brother's descendants and just before the paternal grandfather. The expression "compact series of heirs" in paragraph 2 apparently refers to the series of heirs mentioned in Yajnavalkya's text quoted above and not to the heirs mentioned in section V of the *Mitakshara*.

It is also urged that if son includes the grandson, the daughter's grandson would succeed after the daughter's son. The answer to this is that the daughter's son succeeds because he is assigned a particular place by Yajnavalkya in the text quoted above, otherwise he would have succeeded as *bandhu*. This cannot be said of the daughter's grandson who is not mentioned in the text.

The learned advocate also relied upon the Subodhini and the Madanparijat as supporting his contention that the great-grandfather and his descendants succeed after the grandfather's grandson, *i. e.*, the paternal uncle's son. The latter of the two authorities only recites the words of the *Mitakshara* literally. The Subodhini, no doubt, at one place, says that the brothers' grandson does not succeed after the brother's son, but in the case of unobstructed and obstructed inheritance it would include the son of the grandson in the line of heirs. (Mandlik's Hindu Law, p. 382). Besides, the author

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of that work would include females among *gotraja* heirs, which is admittedly not the law in the Benares school.

On the other hand, Apararka and Vaijayanti clearly support the view that the grandson of the paternal uncle succeeds before the line of the great-grandfather comes in.

Mr. Mandlik and Mr. Golap Chandra Sarkar adopt the list of heirs specifically mentioned in the *Mitakshara* and would not extend the lines of the father and the grandfather to three degrees of descendants but would limit them to two.

On the other hand Professor Sarbadhikari (Tagore Law Lectures, 1880) would extend the list of heirs to three degrees of descendants in each case. He points out that there are fourteen classes of *sapinda* heirs, four of whom are propinquous *sapindas*. The first of these are the three immediate descendants of the deceased. The next class consists of the mother, the father and their three immediate descendants. In the third class are the grandmother, the grandfather and their three immediate descendants. The fourth class consists of the paternal great-grandmother and the great-grandfather with their three immediate descendants (p. 654). He gives a complete table of *sagotra sapinda* heirs on p. 656, assigning, in the ascending line, the order of succession to each ancestor and his three immediate descendants. In this respect he differs from Mr. Mandlik, who gives the right of succession to two descendants only (see table on p. 378). Dr. Jolly adopts the same view as Mr. Sarbadhikari (Hindu Law, pp. 210 and 212). The table of heirs given by him is on the same lines as that of Mr. Sarbadhikari and he gives to the grandfather's great-grandson the 17th place, while he assigns the 21st place to the great-grandfather's grandson. Mr. Mayne in his well-known work (7th edition, p. 777) mentions the grandfather's successors as being "issue to the third degree inclusive."

In the *Vyavastha Chandrika*, vol. I, p. 183, the great-grandson of the paternal grandfather, that is, the grandson of the paternal uncle is included. Messrs. West and Bühler also think (p. 124) that the descendants of the grandfather must be exhausted before the great-grandfather's line can come in. The opinion of Mr. Bhattacharyya (2nd edition,

pp. 444 to 448) was that the three immediate descendants of the grandfather succeed before the great-grandfather. Referring to his opinion and that of Professor Sarbadhikari, Mr. J. C. Ghose in his work on Hindu Law, (2nd edition, p. 148), says :—

• “This rule is in accordance with the later theory of *sapinda* and probably more consistent with the principle of propinquity.”

The weight of the authority of commentators and text-writers is thus in favour of the respondent. It is said in regard to Appararka's opinion that it is based on the theory of spiritual benefit, which is inconsistent with the *Mitakshara* theory of *sapindaship*. The *Viramitrodaya*, however, which, next after the *Mitakshara*, is of great authority in the Benares school, regards superior spiritual benefit as a determining factor in cases of competition, and this seems to have been the opinion of their Lordships of the Privy Council *Bhaya Ram Singh v. Bhaya Ugar Singh* ⁽¹⁾. However it is not necessary to go into that question, because, as observed by Mr. Ghose (p. 147), *sapinda* relationship is

“based on the identity of the body of the father, son, grandson and great-grandson.”

The preponderance of the case-law on the subject is also in favour of the respondents. In *Kalian Rai v. Ram Chandra* ⁽²⁾, a bench of this Court held that the word “son” in the *Mitakshara* includes “grandson,” and therefore the brother's grandson is a nearer *sapinda* than the son of the paternal uncle. The exact question now before us was not decided in that case, but the principle laid down applies equally to the present case. The authorities were referred to and discussed and the conclusion arrived at was that the *Mitakshara* was not to be understood in a restricted sense when using the word *putra* and *santan*, and that those words include the grandson also. The opinion of Mr. Harrington in the case of *Rutheputty Dutt Jha v. Rajunder Narain Rae* ⁽³⁾, was considered and approved. That opinion has been adversely criticised by Mr. Mandlik (page 380-383). With much of this criticism I am unable to agree. The weight of authority, as pointed out above, is in favour of the view that the line

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(1) [1839] 13 Moo. I. A., 373. (2) [1901] I. L. R., 24 All., 128.

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of each ancestor down to the three immediate descendants must be exhausted before the next ancestor and his descendants can come in. In so far as Mr. Harrington extends the line to six degrees, he has apparently gone too far, but that is no reason for rejecting the theory he enunciates, the principle of which is, in my opinion, fully borne out by authority.

The decision of this Court, in the case mentioned above, appears to have met with the approval of the Bombay High Court in *Kash-bai Ganesh v. Sitabai Raghunath Shivram* ⁽¹⁾. In *Rachava v. Kalingapa* ⁽²⁾, Mr. Justice TELANG, referring to the *Mitakshara*, chapter II, section V, placita 4 and 5, observed that it was laid down that "the propinquity of *gotra-jas* is to be determined by lines of descent, that is to say, the inheritance is to go first in the line (the word in the original is *santana*, literally 'continuation') of the paternal grandfather then, in default of any one in that line, of the paternal great-grandfather and so forth." The learned Judge understood the word *santana* in an extended sense and in his opinion the line of the grandfather was to be exhausted before the great-grandfather and his line came in, so that this decision may be regarded as an authority supporting the case of the respondent.

In *Kureem Chand Gurain v. Oodung Gurain*, ⁽³⁾ which was a *Mitakshara* case, the Calcutta High Court approved of Mr. Harrington's opinion and recognised the right of the brother's grandson.

The Madras High Court has held the contrary view. The most recent case on the point is that of *Chinnasami Pillai v. Kunju Pillai* ⁽⁴⁾, where it was held that the word "son" in the *Mitakshara*, chapter II, does not include the grandson. The learned Judges seem to have based their decision on what they regarded as "the consensus of opinion among lawyers dealing with the *Mitakshara* school of law as prevalent in this (Madras) Presidency." For the reasons already stated, I am unable to agree with the learned Judges and to dissent from the view taken in this Court in *Kalian*

(1) [1911] 13 Bom. Law Rep., 552. (2) [1892] I. L. R., 16 Bom., 716.

(3) [1866] 6 W. R., 158.

(4) [1911] 21 Mad. L. J., 186, S. C., I. L. R. 35 Mad., 152.

Rai v. Ram Chandar. In my opinion on principle and on the authorities the view adopted in that case is correct.

Upon a true interpretation of the texts of the *Mitakshara* and on the authorities referred to above, I hold that the three immediate descendants of the grandfather succeed in preference to the great-grandfather and his descendants and that the great-grandson and the grandfather is a preferential heir as against the grandson of the great-grandfather. The defendant, Laltu Singh, is therefore the next heir to Sahib Sahai and the plaintiff's claim has been rightly dismissed. I would dismiss the appeal with costs.

PIGGOTT, J.—This is a suit for possession in respect of property, both moveable and immoveable, of very considerable value, of which the last full owner was one Sahib Sahai, who died in July, 1873. Possession has since been with his mother Rani Kishori Kunwar, and the succession opened on the death of that lady in the month of August, 1907. The suit is based upon a pedigree, according to which the first plaintiff, Buddha Singh *alias* Chaturi Singh, is the grandson in the male line of one Nain Sukh Mal, who was the paternal grandfather of Raja Gur Sahai (or Gauri Sahai), husband of Rani Kishori Kunwar and father of Sahib Sahai. The plaintiff's own pedigree shows, that Laltu Singh (defendant No. 1) is the grandson in the male line of Puran Singh, own brother of Raja Gur Sahai. The defendants did not admit the plaintiff Buddha Singh to be in fact the son's son of Nain Sukh Mal; but this issue of fact has not at present been tried out. The learned Subordinate Judge has held in effect that whatever doubt may exist elsewhere on the question of Hindu law involved, the decision of this Court in the case of *Kalian Rai v. Ram Chandar* ⁽¹⁾, was binding upon him and was sufficient authority for the proposition that Laltu Singh as the grandfather's great-grandson of Sahib Sahai was a nearer heir to that gentleman under the Hindu law of the *Mitakshara* school than Buddha Singh *alias* Chaturi Singh, even supposing the latter to be able to prove himself to be the grandson of Sahib Sahai's great-grandfather, all the relationships referred to being of course in the direct male line. There was some little discussion before us at the commencement of the hear-

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ing as to the convenience of the course thus adopted by the court below, but it is to be noticed that the plaintiffs have not made it a plea in their memorandum of appeal that they desired an issue to be remitted upon the question of fact, and it seems clear that the learned Subordinate Judge acted as he did with the acquiescence, if not with the express consent, of both parties. We thought it best therefore to accept the position as it stood, and we have had the advantage of hearing the question of law argued out at length with the assistance of an array of counsel on both sides exceptionally well qualified, if I may take the liberty of saying so, to assist the court in arriving at a correct conclusion.

Much of the argument centred round Mr. V. N. Mandlik's exposition of the Hindu Law of succession contained in his commentary on the "Vyavahara Mayukha," and I find it convenient to turn at once to the table given by that learned author at page 378 of his work, quoting from the edition of 1830. We have exhausted in this case the line of the *propositus* himself and that of his father, and the question is as to the steps to be followed in order to arrive at the next heir amongst the *gotraja sapindas*. There is no grandmother or great-grandmother to be considered in this case, and I need not complicate the question at this stage, by considering the position assigned to these ladies, or to other female heirs of the same class. Broadly speaking, Mr. Mandlik's principle as applied to the facts of the present case is to ascend to the line of the grandfather, to follow this downward for two generations only, that is to say, as far as the grandfather's son's son (that is to say, the first cousin of the *propositus*), and then to ascend to the next generation and take the line of the great-grandfather. This is similarly followed for two generations only before ascending to the line of the grandfather's grandfather, and the process is continued to the sixth in ascent from the *propositus* (the great-grandfather's great-grandfather), after which Mr. Mandlik returns once more to the lower generations, continuing each line in turn until he reaches the sixth in descent, either from the *propositus* himself or from the common ancestor in each case. It is this table, together with the authorities upon which it purports to rest, which forms the basis of the appellant's case. It places the plaintiff,

Buddha Singh, as great-grandfather's grandson, eighteenth in the order of succession, while the defendant, Laltu Singh, as grandfather's great-grandson, stands only thirty-eighth. He is postponed, not merely to Buddha Singh, but to such hypothetical heirs as grandfather's first cousins, as well as to the practically inconceivable heirs arrived at by ascending two generations higher still, who appear as numbers 24 to 30 inclusive in Mr. Mandlik's table.

As against this scheme of inheritance, which I may refer to for convenience sake as Mr. Mandlik's, there have been laid before us two other schemes or theories, which I propose to speak of as Mr. Harrington's and Mr. Sarvadhikari's. The former was expounded by Mr. Harrington of the Sudder Dewani Adalat in the case of *Rutcheputty Dutt Jha v. Rajunder Narain Rae* as long ago as 1839,—*vide* 2 Moore's Indian Appeals, p. 133. It goes on the principle of exhausting the line of each ascendant down to the sixth person in direct male descent, before taking another step in the upward line. As applied to the facts of the present case, this principle would exhaust the line of Sahib Sahai's grandfather, not merely down as far as his great-grandson, the defendant Laltu Singh, but if necessary three generations further, before seeking for an heir in the line of Sahib Sahai's great-grandfather. The principle laid down by Mr. Sarvadhikari, and arrived at independently by Dr. Jolly in his "History of Hindu Law" (at p. 212) lies between these two. It would follow Mr. Mandlik's plan in its general outline, but would carry the descent in each case one step further, namely, to the great-grandson of the common ancestor concerned. Thus in the present case the line of Sahib's grandfather would have to be carried down to that gentleman's great-grandsons, and would thus reach the defendant Laltu Singh, before any attempt was made to search for other possible heirs by ascending to the line of the great-grandfather in order to reach the plaintiff Buddha Singh.

The defendants of course stand to win this case if the Court will accept either Mr. Sarvadhikari's or Mr. Harrington's scheme of succession, but their learned advocate was inclined to press the former upon our acceptance rather than the latter. For purposes of argument however I prefer to

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consider Mr. Harrington's first. I do not propose to transcribe the ancient texts on which the argument turns, the most important of them have been set forth in the judgment of the lower court. The essential point is the interpretation to be placed on the fifth section of the second chapter of the *Mitakshara*. We must go back however to the beginning of the chapter in order to remind ourselves that we are dealing with "the estate of one who departed for heaven leaving no male issue," *vide* Yajnavalkya, chap. II, section V. 137, as quoted in the *Mitakshara* itself. The word used here is "*aputrasya*," and it is common ground that as used in this particular place and in this particular context, the word does not mean a man who has left no sons surviving him, but means at least a man who has left no son, grandson or great-grandson in the male line. Mr. Harrington would take it broadly as meaning a man who has left no lineal descendants in the direct male line. The first four sections of the chapter deal with the succession to the estate of such a man as far as the exhaustion of his father's line; we then come to the fifth section introduced by the words "if there be not even brothers' sons, gentiles share the estate." Amongst these the ancient author proceeds to put the paternal grandmother, first and he diverges into a curious exposition of his reasons for so doing. He then explains the general distinction which he draws between gentiles (*sapindas*) and cognates (*bandhus*) and finally returns to his table of succession at the fourth sub-division of the section. Thus, he says, on failure of the father's line (*santan*), the succession goes to the paternal grandmother, the paternal grandfather, the uncles and their sons. The next sub-division gives the succession "on failure of the paternal grandfather's line" to the paternal great-grandmother, the great-grandfather, his sons and their issue and provides further that this is the way in which the succession of *gotraja sapindas* is to be reckoned "up to the seventh degree." After this we are to make a fresh start in search of kindred connected by libations of water, and the principle laid down appears to be that we are to resume the same process and carry it to the seventh degree beyond that already reached, "or else as far as the limits of knowledge as to birth and name extend." The great point in favour of

Mr. Harrington's scheme of succession is that it avoids making a fresh start until the necessity for so doing is clearly indicated by the ancient text itself. It carries out one single and consistent process up to the dividing stage marked by the end of pl. 5, and it then proceeds to follow the directions of pl. 6 by carrying a precisely similar process six degrees further. It rests upon the contention that the words "son" or "issue" wherever they occur in this section must be interpreted in accordance with the general context, and must be governed by the use of the word "*santan*" at the beginning of pl. 4 and pl. 5, as well as by the general direction to carry the entire process "up to the seventh degree." That there is authority for the use of the word "sons" in other parts of the *Mitakshara* so as to include at least the sons and grandsons of such sons is not denied, the contention for the appellants is that this use is only to be accepted where there are express words in the text itself to authorise such an interpretation. The argument in favour of Mr. Harrington's scheme I would state as being that the interpretation of such words as "son" and "issue" should be governed in each case by the context as a whole, and that the context in the present case is such as to justify, if not to necessitate, an interpretation which will carry the direct line of descent downwards to the limit of the "seventh degree" prescribed by pl. 5. I understand that Mr. Harrington, in order to give symmetry and completeness to his scheme of inheritance would propose formally to place the lineal descendants of the *propositus* in the male line down to the seventh degree (*i. e.*, down to the great-grandson of the great-grandson) first in order, before ascending to the line of the father at all, and would similarly exhaust the line of the father down to the grandson of a great-grandson of a brother of the *propositus* before ascending to the grandfather's line. This has been made matter of serious objection against the entire scheme by Mr. Mandlik and other Hindu critics. They contend that on the ancient texts themselves there can be no doubt that the ascent to the father's line (I am passing over for purposes of argument the rights of the wife, the daughter, the daughter's son and the mother) commences as soon as the line of the *propositus* has been carried down to his great-grandson.

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Moreover they lay particular stress on the position of the grandmother, contending (and this is an argument used both against Mr. Harrington's scheme and against that of Mr. Sarvadhikari) that it is quite clear from section V, pl. 2 of the second chapter of the *Mitakshara* that the paternal grandmother succeeds immediately after the brother's son. These arguments are not without real weight, but I conceive that there is much to be said by way of rejoinder. One cannot deal with an ancient text like that of the *Mitakshara* precisely as one would with a modern Act of Parliament. I cannot feel that it is a conclusive argument against a scheme of inheritance which is really intended to apply when one reaches the "*gotraja sapindas*," after the exhaustion of the father's line, that it involves by analogy the assigning of a place in the line of succession to such improbable heirs as the great-grandson, or the brother's great-grandson, of the *propositus*, such as does not seem to be strictly warranted by the ancient text. The text relating to the paternal grandmother represents what the author of the *Mitakshara* felt to be a difficulty, not to say an anomaly, about the older scriptures on which he was commenting. It is at least open to argument whether, on a correct rendering of the original, the author's meaning should not be taken to be that the paternal grandmother can only come in "at best" or "at the highest" after the brother's son. In any case the argument to some extent at least, begs one of the most critical questions in issue, that is to say, whether the expression "brother's son" in this very passage may not include the descendants of the brother in the direct male line either to the third or to the sixth degree.

I now pass on to consider Mr. Sarvadhikari's scheme. In order to the due appreciation of this it is necessary to go right back to the original text of Manu which is the foundation of the Hindu law on the question. I quote from Manu III, 216, as translated by Mr. Ghose at p. 66 of his book on Hindu law:—"To the three ancestors water must be offered, to three the funeral cake (*pinda*) is given; the fourth (descendant) is the giver of these (oblations), the fifth has no concern (with them)." The way in which this text has been understood and applied by subsequent commentators can

best be understood if we start with a series of seven descendants in the direct male line in which our *propositus* occupies the middle place. He offers the mystic "funeral cake" to three ancestors, *i. e.*, to his own father, paternal grandfather and paternal great-grandfather, similarly he has three descendants who make the same offering to him, namely, his son, his son's son and his great-grandson, the son of his son's son. By the "fifth" who has "no concern" is to be understood the fifth person in the descending series reckoning the *propositus* himself as the first, that is to say, the "fifth" person would be the great-grandson's son. In the table at page 378 of Mr. Mandlik's book to which I have already referred, we find as the basis of the scheme of inheritance a series, not of seven, but of thirteen descendants and ascendants in the direct male line, with the *propositus* or "deceased owner" in the centre. This is presumably because of the interpretation which all Hindu lawyers appear to have placed on the expression "up to the seventh degree" in the *Mitakshara*, chapter II, section V, pl. 5. The series itself stands connected with the *propositus* not only by the offering of water spoken of in the text of Manu, but by the fact that the great-grandfather offers the funeral cake to his own great-grandfather, and the great-grandson receives the same offering from his own great-grandson. The general principle has been laid down (*vide* Mayne's Hindu law at page 777 of the seventh edition) that "so far as the issue of each ancestor are his *sapindas*, they are also the *sapindas* of the person with whom they are connected through that ancestor." From these considerations Mr. Sarvadhikari deduces a theory of nearer and more remote *sapindas*, according to which the "nearer" line comes to an end in each case with the great-grandson of the *propositus* himself and of each male ancestor in the ascending line in turn, the search of more "remote" *sapindas* is then recommended with the great-grandson's son of the *propositus* himself and continued as already explained. The theory finds support from a passage from Visvesvara referred to at page 382 of Mr. Mandlik's book, which has evidently puzzled that learned author so much that he can only get away from it by suggesting some misreading in the manuscripts now available, a suggestion which later research

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has apparently quite failed to bear out. The advantage of this scheme over Mr. Harrington's is that it begins the ascent in strict conformity with the letter of the ancient texts after the great-grandson of the *propositus* and that it can quote more direct authority for understanding the word "sons" as including the sons and grandsons of such sons than is available in support of Mr. Harrington's theory that the descendants of such sons to the sixth degree should be deemed to be indicated. I do not say that this argument altogether meets, to my mind, the contention that Mr. Harrington's scheme is based upon the general context of the section of the *Mitakshara* in question (chapter II, section V) read and considered as a whole, but it is certainly not without weight. As the matter presents itself to my mind, a very important question is whether this scheme of Mr. Sarvadhikari's is or is not open, equally with Mandlik's, to an objection which I have already suggested. Does it or does it not involve making a fresh start at a point where no fresh start is indicated by the text of the *Mitakshara* itself? As formulated, or at any rate as presented to us in argument, it seems to me that it does. I venture to throw the suggestion, however, that this objection as applied to Mr. Sarvadhikari's scheme turns rather upon a question of terminology. Would the learned Hindu lawyers who support this scheme of inheritance be content to admit that the heirs arrived at by making a fresh start after the great-grandson of the great-grandfather's great-grandfather come in under pl. 6 as "kindred connected by libations of water"? If this be done, and if we interpret the words "to the seventh degree" in pl. 5, as meaning "up to the seventh degree in the ascending line of ancestors," it seems to me that we arrive precisely at Mr. Sarvadhikari's scheme or table of succession upon a strict and consistent interpretation of the text of the *Mitakshara* and subject only to the condition that we bring in the entire line of what Mr. Sarvadhikari calls the "remote *sapindas*" by virtue of pl. 6 and not under pl. 5 of the text before us. I leave it to Hindu lawyers to say whether this suggestion is hopelessly unacceptable because doing too great violence to the accepted meaning of the term "*sapindas*," though I cannot refrain from remarking that the arguments before us seemed to

disclose abundant instances of varying usage, now stricter and now looser, in respect of this particular term.

I have now said enough to have indicated incidentally the essential basis of Mr. Mandlik's theory and the line of argument upon which it is based. It involves a strict and literal interpretation of the word "sons" or "issue" wherever they occur in section V of chapter II of the *Mitakshara*. It is as if we were to presuppose a second series of "enumerated heirs" given a preferential right amongst the *sapindas* themselves by virtue of the fact that they are specifically mentioned in the text itself, while the position of others is left to be deduced by inference and analogy. These would be the paternal grandmother, the paternal grandfather, his sons ("the uncles") and his grandsons ("their", *i. e.*, the uncle's "sons"); then the paternal great-grandmother, the great-grandfather, his sons and their issue"—the latter expression being understood strictly as being the sons of such sons. The Madras High Court, which is the one modern authority clearly on the side of Mr. Mandlik's theory, has gone the full length of accepting these persons as "enumerated heirs", in the same sense apparently in which that expression is issued elsewhere of the "compact series of heirs from the father to the nephew" spoken of in the *Mitakshara*, ch. II, sec. V, pl. 2, *vide Chinnasami Pillai alias Subramania Pillai v. Kunju Pillai and others*(¹). It matters not for the purpose of this particular case that the "enumeration" strictly so called ceases with the line of the great-grandfather, and that Mr. Mandlik himself has to continue his table of inheritance from this point by way of inference and deduction. The fact remains that a son of a great-grandfather's son is specifically mentioned in pl. 5, while the place in the line of succession of a grandfather's great-grandson must be determined by analogy upon one or another of the theories before us. If this specific mention is to be accepted as decisive, in spite of any other arguments in favour of Mr. Sarvadhikari's scheme or of Mr. Harrington's, there is undoubtedly an end of the matter, and the decision of the court below on the issue of law involved must be reserved.

I pass on now to consider the competing theories before us in the light of authority. It was very strongly urged upon

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us in the final argument addressed to the court on behalf of the appellants that we should by no means base our decision upon any interpretation which we might ourselves feel disposed to put upon the text of the *Mitakshara*, even after considering that text in the light of opinions expressed by the most eminent modern commentators, or in view of analogies drawn from published decisions of English Courts. We are asked to decide simply what is the interpretation put upon the text of the *Mitakshara* by those ancient commentators who are the accepted authorities upon that school of law as prevailing in these provinces. I wish to make it clear that I fully appreciate the force of this argument. Had the very learned and able advocate for the appellants succeeded in satisfying me that there was a clear and unmistakeable consensus of opinion amongst such commentators upon the particular point in issue, I should undoubtedly have felt it my duty to accept this consideration as decisive. My learned colleague is better qualified than I am to appreciate the precise force of this argument as it was developed in detail, and if it failed to convince him I can feel no scruples on the point myself. It seemed to me that neither clear unanimity nor unmistakeable certainty of decision in respect of the particular point before us on the part of the authorities cited was made out. In some cases the commentaries quoted simply reproduced the text of the *Mitakshara*, with little or no variation and nothing in the way of comment that had any bearing upon the issue we are considering. It did not appear to me that more than one authority, the "Madna Parijata" (S. Sitarama Sastri's translation) expressed itself with anything approaching certainty in favour of Mr. Mandlik's view. Nowhere did I find anything like a complete examination of the entire section of the *Mitakshara* with a view to deducing therefrom a definite and unambiguous scheme of succession amongst the "gentiles." I cannot accede to the view that the question before us is concluded by a clear consensus of opinion amongst the most ancient authorities of the *Mitakshara* school.

There is no reported decision of their Lordships of the Privy Council which can be regarded as turning upon or finally determining this particular point. It is to be noticed,

however, that what I have spoken of as Mr. Harrington's scheme was formulated in a case which went up to their Lordships, and it is scarcely putting the matter too strongly to say that it received their tacit endorsement. Indeed in a subsequent case *Bhayah Ram Singh v. Bhayah Ugar Singh* (1), though here again the actual point for decision was different, their Lordships seem to have expressed approval of the position that Mr. Harrington's views had received a general endorsement from their authority. The Madras High Court has been on the side of the appellants. The recent case which I have already quoted refers back to an older decision of the same court in *Suraya Bhukta and others v. Lakshminarasamma* (2), where Mr. Harrington's opinion in *Rutheputty Dutt Jha v. Rajunder Narain Rae* (3), are treated as *obiter dicta*, which in a strict sense they undoubtedly were, and a clear finding is given in favour of the succession of a paternal uncle's son before a brother's grandson. This, however, is precisely and definitely contrary to the decision of two Judges of this Court in the case relied upon by the court below, *Kalian Rai v. Ram Chander* (4), and we are bound at least to give the decision of our own Court the greater weight. It was contended before us that this decision does not purport to proceed upon the definite adoption of any one principle or scheme of succession and that the learned Judges responsible for the same were careful to limit themselves to the particular issue before them. I think it is true that they refrained from saying that in their view the brother's grandson must necessarily come in under section IV of chapter II of the *Mitakshara*, but contended themselves with holding that under section V, he would be a nearer heir than the uncle's son, assuming both to take only as "gentiles" under that section. I think it would perhaps be open to us to say that we are not necessarily bound to carry the principle affirmed in *Kalian Rai v. Ram Chander* a step further into the next generation in the ascending line, but I do not see any possible line of reasoning upon which we could find for the appellants in the present case which would not involve a finding that *Kalian Rai v. Ram Chander*

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(1) [1870] 13 M. I. A., 373. (2) [1881] I. L. R., 5 Mad., 291.

(3) [1839] 2 M. I. A., 133. (4) [1901] I. L. R., 24 All., 128.

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was wrongly decided. Finally I may note that the Bombay High Court is almost as clearly against the appellants as the Madras High Court is in their favour. In the recent case of *Kashibai Ganesh v. Sitabai Raghunath Shivram*⁽¹⁾, much of the older case-law on the subject is reviewed and the great authority of Mr. Justice TELANG is quoted for the proposition that :—

"The inheritance is to go first in the line (the word in the original is *santan*, literally "continuation") of the paternal grandfather, then in default of any one in that line, of the paternal great-grandfather, then of the paternal great-great-grandfather, and so forth"

Vide *Rachava v. Kalingapa*⁽²⁾.

I come, therefore, to the conclusion of the whole matter upon a general review of arguments and authorities. It is perhaps difficult for an English Judge to clear his mind altogether of some antecedent prejudice in favour of Mr. Harrington's scheme. The English law is clear that in any question of inheritance through males the remoter ancestor and his descendants are excluded by the nearer ancestor or by his descendants how low soever. One learned author, Mr. Golap Chandar Sirkar Shastri (*vide* p. 290 of his work in the IVth edition) in adversely criticising the decision of this Court in *Kalian Rai v. Ram Chandar*, has been somewhat severe upon our Judges for having (as he seems to suggest) allowed themselves to be influenced by English rather than Hindu ideas of propinquity in relationship. His remarks suggested to my mind the putting of the question actually before us to the test of personal experience. My "grandfather's great-grandson" sounds a somewhat formidable person when you put him to me in that way; but, coming to disentangle him, I find that I know him well. He is the son of my first cousin, a member of a family which I know well, a lad for whom I feel much natural affection. As for my great-grandfather's grandsons, the sons of my grandfather's brothers, I frankly do not know whether or not any such persons now walk this earth. Is the idea of propinquity involved in the Hindu text that "to the nearest *sapinda* the inheritance next belongs," really different when

(1) [1911] 13 Bom. L. R., 552.

(2) [1892] I. L. R., 16 Bom., 716.

you come to relations so far removed in degree, from that upon which the English rule of inheritance is based, and which I find to be strikingly illustrated by the case of my own family? I take leave to doubt it.

Of the schemes of inheritance which we have discussed Mr. Harrington's seems to me the simplest and most consistent. I do not believe that it does any real violence to the ancient text upon which it is based, and it seems to me to have behind it a weight of modern authority beyond that which can be claimed for the other two. On the other hand, Mr. Sarvadhikari's scheme attracts me by the suggestion that it is in closer conformity with essentially Hindu ideas, as going back for its basis to the most ancient authority upon which the Hindu law on the subject is based. Subject to the considerations which I have suggested when discussing it, I think it may claim equally with Mr. Harrington's to satisfy the requirements of section V, chapter II of the *Mitakshara* read as a whole. If the suggestion, which I have ventured to make regarding it, is considered admissible by Hindu lawyers of the modern school, I would prefer Mr. Sarvadhikari's scheme—regarded merely as a system deduced from the text of the *Mitakshara*—to Mr. Harrington's; otherwise I think it open to an objection which would throw back my preference to the older system propounded by the English Judge. I would unhesitatingly prefer either of these schemes to Mr. Mandlik's. With all respect to the learned authors and Judges who accept this last, I would say that the scheme rests upon a pedantically literal interpretation of the words "sons" and "issue", which is at variance with the context of the section read as a whole, and that its logical development does violence to the great principle that "to the nearest *sapinda* the inheritance next belongs."

I would therefore dismiss this appeal with costs.

BY THE COURT.—The appeal is dismissed with costs.

S. C. B.

Appeal dismissed.

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CHHATKU RAI AND ANOTHER

versus

BALDEO SHUKUL AND OTHERS.*

RICHARDS, C. J. *Mortgage—Redemption before expiry of term of mortgage—Breach of*
 BANERJI, J. *essential part of contract.*

The property in dispute was mortgaged to defendants by way of conditional sale for Rs 599-15-0 for ten years, but all but Rs 50-15-0 were left with mortgagees for payment to prior incumbrancers. The mortgagee did not pay up the prior incumbrancers, and the plaintiffs, the vendees from mortgagors, sued for redemptions of the mortgage before the expiry of ten years. *Held*, that on equitable grounds the defendants not having performed what was a most essential part of the contract, the plaintiffs should be allowed to redeem before the expiry of the ten years stipulated for.

APPEAL under section 10 of the Letters Patent, from a judgment of Mr. Justice PIGGOTT, confirming a decree of Munshi Gokul Prasad, Subordinate Judge of Gorakhpur, who confirmed a decree of Babu Ladli Prasad, Munsif of Basti.

The facts are these:—Baldeo executed a mortgage by conditional sale in favour of the defendants, second party, on August 21, 1905, for a term of ten years. The mortgage money was Rs. 599-15-0, out of which only Rs. 50-15-0 were paid to the mortgagor and the balance was left with the mortgagee for payment of debts due to prior creditors. This amount not having been paid, Baldeo transferred the same share to the plaintiff on January 5, 1906. The plaintiff brought the present suit against the defendants, second party, the mortgagee, under the deed of August 21, 1905, to redeem that mortgage on payment of Rs. 50-15-0, on the allegation that he had paid the sum of Rs. 549-15-0 to the prior creditors of Baldeo and was entitled to redeem. The defence of the defendants, second party, was that he himself had paid the sum of Rs. 549-15-0, and in any case that the suit for redemption was premature, the period of ten years not having elapsed. The courts below without a finding whether the defendants,

second party, had actually discharged the prior debts which he had undertaken to pay, dismissed the suit on the ground that it was premature, the period of ten years not having elapsed. On second appeal, PIGGOTT, J., confirmed the decision of the court below by the following judgment :—

PIGGOTT, J :—The point really in issue in this appeal admits of being stated without going into all the somewhat complicated, but not strictly relevant, details. The proprietor of a one anna share in certain zamindari property executed a mortgage by conditional sale, terms of which were as follows :—

The mortgagee paid Rs. 50-15-0 in cash to the mortgagor, and covenanted to pay Rs. 549 to certain other creditors of the latter. The mortgagor covenanted to give the mortgagee possession for ten years and to redeem at the end of that time ; there was the usual stipulation that, failing redemption at the time specified, the instrument should operate as a deed of sale.

The plaintiffs have acquired the equity of redemption in this one anna share. They say the holder of the mortgage above referred to has not paid off the creditors in accordance with the stipulations in the deed ; they accordingly deposit in court Rs. 50-15-0 for payment to the mortgagee and sue for possession. The courts below have held that the suit is premature, the period of ten years stipulated in the mortgage deed not having expired. The plaintiffs do not contest the general principle that on a deed like the one in question the mortgagee is entitled to claim the benefit of the stipulation ensuring him ten years' possession ; they plead that it is inequitable that the mortgagee should enforce this stipulation when he has not performed his part of the bargain. The principles governing the question in issue are to be found in sections 39, 55 and 73 of the Indian Contract Act (Act IX of 1872) ; a consideration of these sections shows that the courts below were right, that the mortgagor (or the plaintiffs as representatives of the mortgagor) cannot claim relief against the contract allowing ten years' possession to the mortgagee, and that the mortgagor's remedy for the loss he is alleged to have suffered is by way of a suit for damages. The contract embodied in the instrument of mortgage cannot be set aside unless the plaintiffs can bring the case within the scope of section 39 or of section 55 of Act IX of 1872. The latter section cannot apply because no time was fixed within which the mortgagee was to pay off the creditors named in the deed. Nor can it be said that he has either "refused to perform or disabled himself from performing his promise in its entirety" within the meaning of section 39. The plaintiff's case is at most that he has neglected to perform it. So far from refusing to do so, his plea on the facts (a plea which the decision of the courts below on the issue of law has prevented them from investigating) was that he had performed it. It cannot be said that the mortgagee has disabled himself from performing his part of the contract, or that it has become impossible of perform-

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ance within the meaning of section 56 of Act IX of 1872. The case is simply one for a suit for damages. This appeal therefore fails and is hereby dismissed with costs.

The plaintiffs appealed under section 10 of the Letters Patent. On the appeal coming up for hearing before RICHARDS, C. J. and BANERJI, J., a finding on the issue as to whether the defendant, second party, had or had not paid the amount which he had undertaken to pay, was called for. The finding on this issue was in the negative. The appeal was then re-argued.

Peary Lal Banerji, for the appellants, contended that the mortgagee, defendant, second party, was not entitled to resist the claim for redemption on the ground that the claim was premature. The reason for enforcing a contract for a fixed term was based on the principle that when a mortgagee had parted with his money on the understanding that he would be allowed to enjoy the usufruct of the property for a fixed term, he should not be deprived of the fruits of his bargain by being made to give up the property before the expiration of the period. But this equitable rule could not be enforced by a mortgagee who had never parted with his money. If a mortgagor in order to save himself and his property makes a mortgage for a long term on the understanding that the mortgagee would pay off his creditors, it would be most unfair to allow the mortgagee to retain possession of the property without paying off the prior debts and thus expose the mortgagor to all the risks which he had intended to avoid by making the mortgage. If, under such circumstances, the mortgagee was allowed to resist the claim for redemption, it would be a most deplorable consequence to flow from an equitable rule.

Jogendra Nath Mukerji, for the respondent, urged that the mortgagor was bound by the terms fixed, just as much as the mortgagee was bound. A mortgage when made was not a mere contract but a conveyance and the mortgagor could not avoid the mortgage simply because a portion of the mortgage money had not been paid. He cited

Rashik Lal v. Ram Narain, [1911] 9 A. L. J. R., 198.

Bajrangi Sahai v. Uditnarain Singh, [1906] 11 C. W. N., 933.

[RICHARDS, C. J.—If the mortgagee had advanced the whole money and the mortgagor has failed to deliver possession of the entire property mortgaged, could the mortgagor prevent the mortgagee from suing before the time fixed ?]

P. L. Banerji, not heard in reply.

- The judgment of the Court was delivered by

RICHARDS, C. J.—The vendors of the plaintiffs in this appeal made a usufructuary mortgage in favour of the defendants of the second party. The consideration for the mortgage was Rs. 599-15-0. All save Rs. 50-15-0 were left with the mortgagees for payment of creditors of the mortgagors. It has been found as the result of certain issues which we referred to the court below that the creditors were prior incumbrancers of the mortgaged property, and that the mortgagee never discharged the incumbrances. The usufructuary mortgage was by way of conditional sale and provided that the property should not be redeemed for ten years. The present suit is in form a suit to redeem the property upon payment of Rs. 50-15-0 which was the full amount of the consideration given by the mortgagees. The defendants, second party, contend that the plaintiffs cannot redeem the property or get possession of it until the expiration of the term of ten years, and this notwithstanding that the prior incumbrances to meet which the greater part of the consideration was left with them have never been discharged by them. Both the lower courts dismissed the plaintiff's suit. On second appeal to this Court the decision of the courts below was affirmed.

The plaintiffs come here in appeal under the Letters Patent and contend that inasmuch as the defendants, second party, never kept their part of the bargain by discharging the incumbrances which they agreed to discharge, they ought not to be delayed in redeeming or getting back possession of the property until the end of ten years. It seems to us that if under the circumstances of the present case the defendants, second party, are allowed to remain in possession of the property for the full period of ten years, taking the profits and allowing the interest on the prior incumbrances to accumulate, the plaintiffs will be without any proper or effectual remedy. It is doubtful whether a suit for damages

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could possibly be brought at the present time, and at the expiration of the period of ten years it will only be an effectual remedy if the defendants, second party, or their representatives are sufficiently good marks for damages. We think that on equitable grounds the defendants having not performed what we deem to be a most essential part of the contract so far as they are concerned, the plaintiffs ought to be allowed to redeem the property before the expiration of the period of ten years.

We accordingly allow the appeal, set aside the decree of this Court, and also the decrees of the courts below and decree the plaintiff's claim for redemption on payment of Rs. 50-15-0. The appellants will have their costs in all courts. We allow one month for payment of the Rs. 50-15-0 mentioned above. The decree will be drawn up in the usual form.

A. C. M.

Appeal decreed.

PRIVY COUNCIL.

FATEH CHAND AND OTHERS

versus

KISHEN KUNWAR.

Practice—Civil Procedure Code (Act XIV of 1882), sections 584 and 585—Second Appeal—Construction of documents—Zamindar and tenant—Rights of zamindar in respect of house-sites and grove-lands—Wajib-ul-arz—Bengal Chauthdari Act (XX of 1856)—Town—Agricultural village.

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The right construction of documents is a question of law which Judges in second appeal are not, by sections 584 and 585 of the Code of Civil Procedure (Act XIV of 1882), precluded from considering by any finding of a lower appellate court, based on such documents.

When a Subordinate Judge arrives at findings of fact by inferences drawn upon incorrect construction of a *wajib-ul-arz*, the Judges in second appeal are not bound by such findings of fact.

Held further that the *wajib-ul-arz* was cogent evidence of the rights as they existed when it was made of those holding proprietary or other rights of property within the mauza, and in it neither the plaintiffs nor any predecessors of theirs were shown as tenants who had special rights which were heritable and transferable ;

Kishan Kunwar v. Fateh Chand, I. L. R., 29 All., 203, affirmed.

APPEAL, by special leave, from a judgment and decree of the High Court of Judicature for the North-Western Provinces at Allahabad, dated the 7th November, 1906, which reversed a judgment and decree of the Subordinate Judge of Aligarh, dated the 25th July, 1904, which set aside a judgment and decree of the Munsif of Etah, dated the 22nd September, 1903.

The plaintiffs-appellants purchased six plots of land in a village called Rampur. The plots consisted partly of groves and partly of plots of land, on which houses had formerly stood. But the latter had since the demolition of houses, been brought under cultivation. All the plots were situated in a mahal of which the sole zamindar was the defendant-respondent. The Revenue court refused the application of

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the plaintiffs for recording their names as those of absolute owners and proprietors of the plots purchased by them. The plaintiffs, thereupon, instituted the present suit to obtain cancellation of the order of the Revenue court and for a declaration that they (the plaintiffs) were the proprietors in possession of the lands and, as such, were entitled to have their names entered in the revenue papers as proprietors, and for consequential reliefs. The Munsif dismissed the suit, but the Subordinate Judge, on appeal by the plaintiffs, decreed it. The High Court, however, on appeal by the defendant, dismissed the suit, and the plaintiffs brought the present appeal to His Majesty in Council by special leave. For a report of the judgment of the High Court see

Kishan Kunwar v. Fateh Chand, I. L. R., 29 All., 203.

B. Dube, for the appellants : The Subordinate Judge found that the appellants were the proprietors of the lands in suit and the High Court in second appeal should have accepted that finding which is purely a finding of fact. In second appeal the finding of the lower appellate court is binding on the High Court :

Code of Civil Procedure (Act XIV of 1883), sections 584 and 585 ;

Mussummal Durga Choudhrai v. Jawahir Choudhri, [1890] L. R., 17 I. A., 122, at p 127.

and

Ananjanjari Chowdhri v. Tripura Soondari Chowdhri, [1887] L. R., 14 I. A., 101.

The High Court was not at liberty to reverse the finding of the Subordinate Judge and to find that the appellants were not proprietors. It is submitted that the finding of the lower appellate court should be restored.

The Munsif, relying on

Sri Girdhariji Maharaj v. Chote Lal, [1898] I L R., 20 All., 248,

held that according to custom prevalent in the North-Western Provinces the appellants were not proprietors. But the Subordinate Judge held that that case had no application to the facts here, and he found on evidence that the appellants were proprietors. The High Court reversed that finding. The evidence consisted of a *wajib-ul-arz* and oral testimony. A

wajib-ul-ars, though admissible in evidence, varies in value according to circumstances. See

The Indian Evidence Act (I of 1872), section 35 ;

Rani Lekhraj Kuar v. Baboo Mahpal Singh; [1879] L. R., 7 I. A., 63, and

'*Anant Singh v. Durga Singh*, [1910] L. R., 37 I. A., 191, at p. 197.

• What evidenciary value should be attached to any document is a question of fact, and the High Court had no power to reverse the finding of the Subordinate Judge.

The lands in suit are situated in the *abadi* of mauza Rampur, and the evidence shows that many of the inhabitants whose number is large, are not agriculturists. Rampur is a town and the *wajib-ul-ars*, which relates to an agricultural village, has no application to the land in suit. Again the appellants have been paying the patwari rate, which is payable by the proprietors of land :

North-Western Provinces and Oudh Kanungos and Patwaris Act (IX of 1889), section 5.

It is submitted that the appellants are proprietors. The evidence shows that the lands are transferable and hereditary and the appellants' title should be declared transferable and hereditary subject to the payment of rent. Reference was also made to

Directions for Revenue Officers in the North-West Provinces (1858), 76 ;

Indian Evidence Act, 1872, section 79 ;

Parbati Kunwar v. Chandarpal Kunwar, [1909] L. R., 36 I. A. 125, and

Muhammad Imam Ali Khan v. Sardar Husain Khan, [1898] L. R., 25 I. A., 161.

Sir Erle Richards, K. C. (*W. A. Raikes* with him), for the respondent : The whole question turns upon the construction of the *wajib-ul-ars*. The construction of a document is a question of law and the High Court was perfectly right in reversing the finding of the lower appellate court which was based on inferences drawn from a wrong construction of a document. The question is also a question of 'usage having the force of law' and the High Court was right in setting aside the decision of the Subordinate Judge ; see

Kakrala Abbaya v. Raja Venkata Papayya Rao; [1904 and 1905] I. L. R., 29 Mad., 24.

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Civil Procedure in British India [1908], by Woodroffe and Ameer Ali, 391 ;

and

Code of Civil Procedure (Act XIV of 1882), section 584.

The point is not taken in the appellants' case.

The lands are admittedly situated in the zamindari of the respondent and they are her lands unless the contrary is proved. It is admitted that none of the appellants' predecessor has ever been entered in the Khewat as proprietor, but has always been entered in the Jamabandi as tenant. They had been assessed with rent in 1876 which they have regularly paid ever since. It is submitted that the High Court is right and the appeal should be dismissed.

Dube, in reply, further referred to

Ram Gopal v. Shamskhaton ; [1892] L. R., 19 I. A., 288.

Rajah Nilmoni Singh v. Kirti Chunder Chowdhri, [1893] L. R., 20 I. A., 95.

Luki Narain Jagadeb v. Maharaja Jodu Nath Deo ; [1893] L. R., 21 I. A. 39,

and

Jay Kishen Mookerjee v. Noorga Narain Nay, [1869] 11 W. R., 348.

The judgment of their Lordships was delivered by

Sir John Edge.

SIR JOHN EDGE :—This is an appeal by special leave from a decree of the High Court of Judicature for the North-Western Provinces of India, dated the 7th November, 1906, which reversed the decree of the Subordinate Judge of Aligarh, dated the 25th July, 1904, which had set aside the decree of the Munsif of Etah, dated the 22nd September, 1903, dismissing the suit with costs.

The suit which related to the proprietary title to lands in Rampur was brought in the court of the Munsif of Etah by Lala Fateh Chand, since deceased, and others, against Rāni Kishen Kunwar and others, to obtain the cancellation of an order of the 4th January, 1902, of a court of Revenue ; for a declaration that the plaintiffs were the proprietors in possession of the lands in the plaint mentioned, and as such were entitled to have their names entered in the revenue papers as proprietors ; and for consequential reliefs. Some of the lands in question consisted of lands in the *abadi* of mauza Rampur. Upon those lands in the *abadi* houses had

formerly stood. It is not clear from the record whether or not all of those lands in the *abadi* had been cleared of houses and had been brought into cultivation, but apparently they had been brought into cultivation before suit. It is, however, not necessary to ascertain whether or not all of those lands in the *abadi* had been brought into cultivation as it is the proprietary title to the land whether covered with houses or not, and not the title to the houses, if any, standing upon those lands which is in question in this suit. The remainder of the lands to which the suit relates were lands under groves. Rani Kishen Kunwar was the zamindar of the whole mauza Rampur, and she alone defended the suit. By her written statement, Rani Kishen Kunwar put in issue the alleged title of the plaintiffs as proprietors.

Fateh Chand, the deceased plaintiff, had applied to the Revenue court to have his name entered as that of the proprietor of the lands in question in the revenue papers relating to mauza Rampur. On the 4th January, 1902, the Assistant Collector rejected that application with costs, and on the 9th January, 1903, the plaintiffs brought this suit in the Civil court. The Munsif of Etah having found as a fact that the defendant, Rani Kishen Kunwar, was the zamindar of mauza Rampur, and that the plaintiffs were tenants and were not proprietors of the lands in the plaint mentioned by his decree of the 22nd September, 1903, dismissed the suit.

From that decree of the Munsif the plaintiffs appealed, and in their grounds of appeal alleged that they were the owners in possession of the plots in suit, and that in Khasra Rampur the zamindar is not the owner of the *abadi*, but the lower class of people, who are her ryots, are the owners. The plaint and the grounds of appeal to which their Lordships have referred put it beyond doubt that the title which the plaintiffs claimed in the Munsif's court and on appeal from the Munsif's decree was the proprietary title to all the lands mentioned in the plaint, and was not any inferior title. The Subordinate Judge of Aligarh in the appeal found on his construction of the *wajib-ul-ars* and other documentary evidence that the plaintiffs were the owners of the lands in respect of which the suit was brought, and by his decree declared that the plaintiffs were the owners in possession of

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the property, and decreed the plaintiffs' claim. From that decree of the Subordinate Judge the defendant, Rani Kishen Kunwar, appealed to the High Court of Judicature for the North-Western Provinces of India at Allahabad.

At the hearing of the appeal in the High Court it was urged in argument on behalf of the plaintiffs that the appeal, being a second appeal to which sections 584 and 585 of the Code of Civil Procedure applied, the High Court was bound to accept as conclusive, and was precluded from questioning the correctness of the finding of the Subordinate Judge that the plaintiffs were the proprietors of the lands in respect of which the suit was brought. Sir GEORGE KNOX and RICHARDS, JJ., who heard the appeal, overruled the objection, and on their construction of the *wajib-ul-ars* and other documents in the suit in their judgment stated and found:—

“ From the judgment of the lower appellate court it appears that it is founded on inferences of law drawn by the learned Subordinate Judge from certain documents and the *wajib ul-ars* which were given in evidence. The documents show that the owners of houses in Rampur had been in the habit of selling and transferring their houses. The *wajib-ul-ars* sets forth that the occupiers of houses had this power, but all through the entries the zamindar is recognised, and it is stated that if a new house is to be built, the permission of the zamindar must be obtained. The entry in the *wajib-ul-ars* as to groves is to the effect that isolated trees and clumps of bamboos planted by the tenant can be cut by him, and as to rent-free groves, if the trees should die out and the land be brought into cultivation, rent must be paid, and that if a new grove was to be planted the leave of the zamindar must be obtained. The inference of law that the Subordinate Judge has drawn from this evidence (about which there is no dispute) is that the occupiers of the grove and of the land which had been the sites of the houses were the absolute property of the persons who occupied and used them. In our judgment this inference is a wrong and impossible inference and the decision of the learned Subordinate Judge based thereon is clearly wrong.”

The High Court by its decree allowed the appeal and restored the decree of the court of the Munsif. From that decree of the High Court this appeal to his Majesty has been brought. The principal ground of this appeal is that the decree of the Subordinate Judge is right and that the plaintiffs are the owners of the land in dispute.

On the hearing of this appeal the learned counsel on behalf of the appellants contended that the Judges of the

High Court should have accepted the findings of the Subordinate Judge on the question of title as correct and as binding on them in second appeal and were not at liberty to find that the plaintiffs were not the proprietors of the lands in question. He also contended that the Judges of the High Court had misconstrued the *wajib-ul-ars* and the other documentary evidence and had come to a wrong conclusion. He further contended that the *wajib-ul-ars* of mauza Rampur, which was made in the settlement which commenced in 1872 and extracts from which are on the record of this suit, cannot be treated as applying to the *abadi* of mauza Rampur, the contention being that Rampur, owing to the number of its inhabitants, many of whom are not agriculturists, and owing to the fact that the Government has applied the Chukidari Act (Act No. 20 of 1856) to Rampur, must be regarded as a town and not as a purely agricultural village, to which, according to the learned counsel's contention, a *wajib-ul-ars* is alone applicable. The answer to that contention that the *wajib-ul-ars* does not apply to the *abadi* of mauza Rampur appears to their Lordships to be that the *wajib-ul-ars* to which reference has been made was prepared by the settlement officer for the whole mauza Rampur including the *abadi*, and that all those who were interested were at the time given the opportunity of objecting to the statements contained in it, and further that the Government by applying the Chukidari Act to Rampur did not alter and could not have altered proprietary rights in mauza Rampur or in any part of the mauza. The *wajib-ul-ars* is in their Lordship's opinion cogent evidence of the rights as they existed when it was made of those holding proprietary or other rights of property within the mauza, and it has not been shown that the *wajib-ul-ars* to which reference has been made in this suit differs in any material respect from the *wajib-ul-ars* which their Lordships have been informed by counsel was made in the more recent settlement.

The Judges of the High Court rightly overruled the objection that they were bound to accept as correct the finding of the Subordinate Judge that the plaintiffs were the proprietors of the lands to which this suit referred. That finding of the Subordinate Judge was the result of his having misconstrued the *wajib-ul-ars*. The right construction of documents is a

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question of law which Judges in second appeals are not, by sections 584 and 585 of the Code of Civil Procedure, precluded from considering by any finding of a lower appellate court, based upon such documents. The Subordinate Judge arrived at his finding by inferences drawn upon an incorrect construction of the *wajib-ul-ars*, and the Judges in second appeal consequently were not bound by his finding that the plaintiffs were the proprietors of the lands.

In the *wajib-ul-ars* it is stated that mauza Rampur "is a mahal of zamindari Khalis (held by a single person), and Raja Ram Chandar Singh is the only proprietor without any co-sharer." Raja Ram Chandar Singh was the husband of the defendant, Rani Kishen Kunwar, the present zamindar. There is no documentary evidence to show that the plaintiffs or their predecessors-in-title ever were proprietors of any of the lands to which this suit relates; on the other hand, the Jama-bandi shows that predecessors-in-title of the plaintiffs paid rent as tenants for some of those lands, and in the Khasra for 1297 Fasli the defendant, Rani Kishen Kunwar, is entered as the proprietor of some of these lands, and predecessors-in-title of the plaintiffs are entered as the tenants. The zamindar was not affected by any transfer of lands to which he was not a party, and in the *wajib-ul-ars* neither the plaintiffs nor any predecessors of theirs are shown as tenants who had special rights which were heritable and transferable.

The following paragraphs of Chapter IV of the *wajib-ul-ars* relate to groves and houses, and are important :—

"Paragraph 3.—Relating to the rights of tenants in respect of groves and scattered trees :—

"A tenant has power to cut down the grove or the scattered trees planted by him in his neighbourhood

"If the land is rent-free and the trees have been removed therefrom and the land is brought under cultivation, the tenant shall have to pay the rent. If in future a grove is planted, it can be planted with the permission of the zamindar."

"Paragraph 4.—Relating to the rights of the tenants in respect of the houses in the village and of those which are built :—

"A person residing in a house is owner thereof and he has power to transfer it; but in future a new house shall be built with the consent of the zamindar."

The tenants of the lower class have no power to transfer their houses.

There is evidence on the record that when land in the *abadi* is brought under cultivation, the tenant has to pay rent for it. In their Lordships' opinion the Judges of the High Court rightly construed the *wajib-ul-ars* and drew the legitimate inference from it, and the other documentary evidence in the suit.

On behalf of the plaintiffs-appellants in their appeal the learned counsel who appeared for them pressed their Lordships to advise that the plaintiffs-appellants should be declared to have heritable and transferable rights in the lands in suit, and for that purpose admitted that the plaintiffs-appellants were tenants of those lands. Apart from other considerations it is sufficient for their Lordships to say that that is not the claim in respect of which this suit was brought.

Their Lordships will humbly advise his Majesty that this appeal should be dismissed and the decree of the High Court be affirmed. The appellants must pay the costs of the appeal.

Barrow, Rogers and Nevill, Solicitors for the appellants.

T. C. Summerhays and Son, Solicitors for the respondent.

J. M. P.

Appeal dismissed.

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PRIVY COUNCIL.

SHANKAR DIN AND OTHERS,

versus

GOKUL PRASAD AND OTHERS.

*Mortgage—Right to redeem qualified—Suit for redemption—Oudh Law—
Oudh Estates Act (I of 1869), section 6—Onus Probandi.*

There is nothing in law to prevent the parties to a mortgage from coming to any arrangement afterwards qualifying the right to redeem, and where the right to redeem is so qualified, a suit for redemption based on the mortgage cannot be maintained.

Where the plaintiffs, who sued in the Province of Oudh for redemption of property mortgaged in 1846, were unable to produce the deed of mortgage and the defendants, the mortgagees, would not produce it on the ground that it was lost,

Held, that as the transaction took place ten years before the annexation of Oudh, it came within the purview of the Oudh Estates Act (I of 1869), section 6 of which imposed certain restrictions on the right of redemption in respect of properties held by the Taluqdars on mortgage, and the onus was cast on the plaintiffs to show that they had, in view of that section, the right to redeem.

APPEAL against a judgment and decree of the court of the Judicial Commissioner of Oudh which reversed a decree made on appeal by the court of the Subordinate Judge of Biswan.

The principal question for determination was whether the appellants were entitled to redeem a mortgage executed on the 12th of July, 1846, by one Ahlad Singh, in favour of one Daryao Singh. The property mortgaged were the villages of Gathia and Pipri and the mortgage money was Rs. 388-15-0. The two villages formed part of Taluka Rampur and Biswan which belonged to the said Daryao Singh, whose name was entered in Lists I and III of Taluqdars prepared under the Oudh Estates Act (I of 1869), section 8.

The plaint alleged that the mortgagor was to retain possession of 250 (*kham*) bighas of land, and receive the sum of Rs. 87-8-0 annually from the mortgagee, who was to have

possession of the rest of the villages and appropriate the profits in lieu of interest, and that redemption was to take place in any year during the fallow season (paragraph 3).

The plaintiffs-appellants were the representatives of Ahlad Singh, the mortgagor. On a partition among the descendants of Daryao Singh, the mortgagee, the village of Gathri fell to the share of Shankar Bakhsh Singh, whose estate has been brought under the management of the Court of Wards. The village of Pipri was allotted to Musammat Ram Kali, who transferred it to the first respondent, Munshi Gokul Prasad, the President of the Kayastha Scholarship Trust. The suit was originally instituted to redeem both villages. So far as it related to Gathri it was dismissed in default of sufficient notice to the Court of Wards, and the present appeal was confined to the right to redeem the village of Pipri.

In the written statement filed on behalf of the said President, it was admitted that Ahlad Singh had made a possessory mortgage in 1846, but the terms of the mortgage, as stated in the plaint, were denied. The respondents did not produce the deed, but alleged that "it was not found in spite of search." It was also pleaded that the suit could not be maintained in consequence of a compromise made on the 7th January, 1870, between the predecessors of the parties at the time of the regular settlement of Oudh. Particulars of the compromise are given in their Lordships' judgment.

The Munsif held on the evidence that the execution of the mortgage was proved and that its terms were as stated in the plaint. He was of opinion that the proceedings taken at settlement were no bar to redemption, and made a decree for redemption of the one village of Pipri.

On appeal the Subordinate Judge was of opinion that the oral evidence produced by the appellants and accepted by the Munsif was not of any value, and that the terms of the mortgage were sufficiently proved by the documentary evidence, by the general circumstances, and by proper inference from the non-production of the deed of mortgage. He agreed with the Munsif that the settlement proceedings were no obstacle to maintenance of the suit, and made a decree dismissing the said appeal with costs.

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On second appeal the court of the Judicial Commissioner held that the plaintiffs had failed to produce evidence which was legally admissible as to the terms of the mortgage, and that the mortgage was redeemable under the provisions of Act I of 1869, section 6. In regard to the proceedings of settlement the said court decided that as there had been no breach of the covenants in the compromise, the plaintiffs had no right to enforce the mortgage of 1846. In the result a decree was made dismissing the suit with costs.

The plaintiffs appealed to His Majesty in Council.

De Gruyther, K. C. and *G. E. A. Ross*, for the appellants : It is not disputed that there was a mortgage in 1846. The deed is in the possession of the respondents, who do not produce it but say that it is lost. They have given no evidence to prove either the loss of the deed or that any search had ever been made to find it. The appellants have proved the terms of the deed as alleged in their plaint, and if the respondents claim that it contained any other terms, it is for them to prove the same.

It is contended that as the appellants have failed to prove that the mortgage-deed fixed no term within which the property comprised therein might be redeemed or that if it fixed such a term, it did not expire before the 13th February, 1856, no decree for redemption could be passed in their favour : see

Oudh Estates Act (I of 1869), section 6.

If the burden is on the mortgagor to prove that no term for redemption was fixed, it is submitted that the appellants have discharged that onus. If any term for redemption were fixed and it expired before February 13, 1856, there could be no redemption after the passing of Act I of 1869. But in the compromise of 1870 the mortgagees agree to let us keep 250 bighas of land and to give us the annuity mentioned in the mortgage-deed. They also accept the conditional right of the mortgagors of "taking away" the mortgaged property. That fact alone shows that the mortgagees admitted that the mortgage was redeemable in 1870 under section 6 of Act I of 1869. Further the point was not specifically raised by the respondents in their pleadings, and there is no evidence adduced by them to prove that a term for redemption was

fixed and that such a term expired before February 13th, 1856. It is contended on the authority of

Rajah Kishen Dutt Ram Panday v. Narendur Bahadoor Singh,
[1875] L. R., 3 L. A., 85,

that the burden of proof is on the appellants to prove that they are entitled to redemption under section 6 of Act I of 1869, but in that case the term for redemption fixed by the mortgage was in dispute. The mortgagor alleged that the mortgage was for a term of twenty years, while the mortgagee contended that the mortgage was a deed of conditional sale for ten years. But in this case it was not alleged that there was any term for redemption, and it is submitted that the onus is on the mortgagee to show that there was such a term and that it expired before February 13, 1856.

At the time of the settlement in 1870 the appellants claimed proprietary rights in the mortgaged villages, but they compromised their claim. That agreement of compromise does not take away the appellant's right to redeem, but if it does, it is illegal.

[SIR JOHN EDGE: There was an extra consideration of 15 bighas of land.]

Will that consideration be adequate?

[SIR JOHN EDGE: I am not referring to the adequacy of the consideration; but only to the fact that there was consideration.]

The compromise was not intended to affect the right of redemption.

MR. AMIR ALI: So long as the agreement of compromise exists, are you or are you not debarred from exercising your right to redeem?

- It does not deal with the right to redeem.
- If it were otherwise, it simply means that the appellants were to give up their right to redeem in lieu of what they got under it, namely, what they were already entitled to under the mortgage plus 15 bighas. The compromise was a settlement of the claim put forward in 1870 and does not affect the right to redeem. Reference was also made to

Compendium of Oudh Taluqdari Law, by J. G. W. Sykes, p. 168, and

Commentaries on the Transfer of Property Act, by Shephard and Brown, note 1, on section 6 of Act IV of 1882.

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Sir Erle Richards, K. C. (B. Dube, with him), for respondent No. 1 : The Taluqdar's title as proprietor got statutory sanction by Act I of 1869, and if any person claims that he has a right to redeem under section 6 thereof, the burden of proof is on him to show that his mortgage is one of the class of mortgages mentioned therein. There is no evidence to show that the appellants have a right to redeem under that section.

But the suit is barred by the compromise of 1870, for which there was additional consideration. It makes no difference whether the right to redeem existed or not in 1870. If it did exist, it is dealt with in the compromise, which creates a new right of redemption on certain conditions. An unconditional right to redeem is inconsistent with the covenant in the compromise. Redemption can only take place under the compromise. Counsel was stopped.

De Gruyther, K. C., replied.

The judgment of their Lordships was delivered by

Mr. Ameer
Ali.

MR. AMEER ALI :—The sole question for determination in this appeal is whether the plaintiffs are entitled in this action to a decree for redemption in respect of certain property mortgaged so long ago as 1846 by their ancestor Ahlad Singh, to one Daryao Singh, whom the defendants represent.

The suit was brought in the court of the Munsif of Bíswan in the province of Oudh in respect of two villages, Pipri and Gathia. This officer dismissed the claim in respect of Gathia for failure on the part of the plaintiffs to serve sufficient notice on the Court of Wards, who held the village for one of the defendants. But he made a decree for redemption in respect of Pipri, and his decision was affirmed on the appeal of the defendants by the Subordinate Judge. On second appeal to the court of the Judicial Commissioner of Oudh this decree has been reversed and the suit dismissed with costs. The present proceedings refer only to Pipri.

The plaintiffs have appealed to His Majesty in Council, and their main contention before this Board is that, having regard to the admitted position of the parties as mortgagors and mortgagees, the learned Judges have taken a wrong view of their relative rights.

In the view their Lordships take of the case they do not deem it necessary to set out at any length the facts on which the parties proceeded to trial. It is not disputed that in 1846 Ahlad Singh mortgaged the two villages in question to Daryao Singh, and that since then the mortgagee and his representatives have been in possession. As the transaction took place ten years before the annexation of Oudh, it came within the purview of the Oudh Estates Act of 1869, section 6 of which imposed certain restrictions on the right of redemption in respect of properties held by the Talukdars on mortgage.

The plaintiffs were naturally unable to produce the deed of mortgage, and the defendants would not produce it on the ground that it was lost. The onus was thus cast on the plaintiffs to shew that they had, in view of section 6 of the Oudh Estates Act, the right to redeem. To discharge this burden and to prove the contract as stated by them in their plaint they relied in part on certain oral evidence and in part on proceedings *inter partes* which took place in 1870 in the course of settlement of disputes regarding the lands of which they were in possession under the terms of the mortgage in question. In the course of those proceedings certain *razinama*hs or deeds of compromise were entered into between the parties and filed in the court of the Extra Assistant Commissioner who, on the 17th of January, 1870, made the following order:—"With the consent of the parties the court decrees the claim subject to the conditions set forth in the *razinama*hs." These documents clearly show that although the right of redemption was admitted as subsisting it was subjected to certain conditions. The plaintiffs' right to the possession of the lands and to the enjoyment of the annuity reserved to them under the deed of 1846, together with various other rights were admitted, some further lands were conceded, and then followed an important covenant which in the document executed by the plaintiffs' ancestors is in these terms:

"Should Anant Singh or any of his descendents resume the under-proprietary tenure, then we, the executants, may at first obtain a decree in respect of the said proprietary tenure.

"Should they even after the decree fail to deliver possession, then we, the executants and our heirs, shall be at liberty to take back the

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Ali.*

villages Pipri and Gathia according to the terms of the deed executed by Ahlad Singh and others in favour of Thakur Daryao Singh after compliance with the said terms."

The same covenant in almost identical language is to be found in the deed of compromise executed by the persons who then represented the mortgagee. They say as follows :—

"Whenever they convert the same into an agricultural land they should pay rent therefor. Wherefore we with our own volition do record that neither we nor our heirs shall, generation after generation, resume the under-proprietary land. And in case we or our heirs resume the same, the said Madho Singh and others may by suing in court obtain a decree.

"If we fail to deliver the land after such a decree, then Madho Singh and others and their heirs shall be competent to take back, recover the villages of Pipri and Gathia after complying with the provision of the deed executed by Ahlad Singh and others in favour of Thakur Daryao Singh, our deceased father."

In their Lordships' judgment the arrangement arrived at in 1870 is conclusive as regards the present action. Whatever may have been the mortgagor's right under the deed of 1846, the parties deliberately came to a settlement in 1870 by which his representatives for certain additional benefit reserved to them under the *rasinamahs*, agreed to subject their right of redemption to certain conditions. There is nothing in law to prevent the parties to a mortgage from coming to any arrangement afterwards qualifying the right to redeem. In the present case it is not alleged that the action is brought upon a breach of the covenant contained in the deed of compromise. Their Lordships are therefore of opinion that the suit was rightly dismissed by the Judicial Commissioners, and they will humbly advise his Majesty to dismiss this appeal with costs.

T. L. Wilson & Co., Solicitors for the appellants.

Barrow, Rogers and Nevill, Solicitors for the respondents.

J. M. P.

Appeal dismissed.

KING-EMPEROR

versus

PAIMAL NAI.*

Criminal Procedure Code (Act V of 1908), section 110—Suspected persons.

CRIMINAL.

1912.

July, 24.

KNOX, J.

Section 110 of the Code of Criminal Procedure is not intended to afford the police a means of keeping the suspected person under detention until they are able to work out a case against him. A Magistrate should not detain a person under that section unless he has the necessary information upon which he can make the order in writing required by section 112.

CRIMINAL REVISION.

The facts of the case appear from the judgment of the court.

On a perusal of the quarterly statement submitted by the Sessions Judge of Saharanpur, the following order in the above case was made by

KNOX, J.—Paimal Nai is reported to have been arrested by the police acting under section 54 of the Code of Criminal Procedure. He was arrested as being a person who had been concerned in a cognizable offence or against whom a reasonable complaint had been made or credible information received or reasonable suspicion existed of his having been so concerned. The offence is apparently theft or possession of stolen property belonging to one Mohan.

Knox, J.

The value of this information or suspicion may be appraised from the fact that when he was arrested no attempt whatever was made to charge him with the offence. The police, instead, had resort to section 110 of the Code of Criminal Procedure and they placed Paimal before a Magistrate with a view of action being taken under that section. They appear to have given the Magistrate some information of the vaguest possible description that Paimal had been concerned in several cases, that he was in the habit of consorting with bad

* Cr. Rev. No. 306 of 1912

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Knox, J.

characters and that he was himself a bad character. As this information which was given to the Magistrate before the 17th February, 1912, was not substantiated by any evidence until the 11th March, 1912, the probability is that this was a bow drawn to venture and that the police had no information such as they said they had. I cannot understand how the learned Magistrate detained Paimal upon a report of this kind.

Section 110 is not intended to afford the police a means of keeping a suspected person under detention until they are able to work out a case against him. Action of this kind on the part of the police tends to throw doubt upon their work generally and a Magistrate should not detain a person under section 110 of the Code of Criminal Procedure unless he has the necessary information upon which he can make the order in writing required by section 112. So far as I can gather from the papers on the record, and on enquiry made, I have been told that there are no further police papers, the arrest of Paimal was not warranted by law. Then I find that on the order being read over and explained to the suspected person he said that he had no cause to shew. Assuming this to be an accurate statement of what the person suspected said, it is difficult to understand why the police asked for further time to produce evidence and why defence witnesses were sent for. The whole proceedings are so doubtful that I direct that the order, dated the 11th of April, 1912, be set aside and that Paimal be unconditionally released.

Conviction set aside.

JAGADAMBA PRASAD AND OTHERS

versus

KING-EMPEROR.*

CRIMINAL

1912.

July, 31.

TUDBALL, J.

*Criminal Procedure Code (Act No. V. of 1908), section 107—**Security to keep peace—Procedure to be followed.*

Persons who are bound over to keep the peace should be given an opportunity of showing cause and all the procedure laid down by chapter VIII of the Criminal Procedure Code should be followed.

CRIMINAL REVISION from an order of Irfan Ali Beg, Esq., Officiating District Magistrate of Pilibhit.

Satya Chandra Mukerji, for the applicants.

R. Malcomson (Assistant Government Advocate), for the Crown.

The facts of the case appear sufficiently from the judgment of the court.

The following judgment was delivered by

TUDBALL, J.—This application in revision arises out of peculiar circumstances. It appears that in the absence of the District Magistrate of Pilibhit a police report, which is not to be found on the record, was submitted to a Magistrate of the first class who was then in charge. On the basis of that report the Magistrate, on the 3rd. of June, which was a holiday, sent for certain persons and simply ordered them to give security to keep the peace up to the 7th of June. It appears that there was some meeting or other connected with the Arya Samaj, and accordingly the Magistrate was afraid that it might end in a breach of the peace. He accordingly passed the aforesaid order. The period for which the order was given has expired. The matter, therefore, does not call for interference by this Court. But it is necessary to point out that the Magistrate's action was quite illegal and improper in that he has ignored completely all the directions which have been laid down in chapter VIII of the Code

Tudball, J.

* Cr. Rev. No. 497 of 1912.

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King-Emperor.

Tudball, J.

of Criminal Procedure in respect of security for keeping the peace. The persons who were bound over had not even been given an opportunity of showing cause, and none of the procedure laid down in chapter VIII was followed. If the order had covered a larger period and if it had been still in force, it might then have been necessary to set it aside. As, however, nothing has happened and the period has expired, there is no necessity for interference by this Court. Let the record be returned.

Record returned.

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1912.

July, 31.

TUDBALL, J.

HASIN-UD-DIN

versus

KING-EMPEROR.*

*Criminal Procedure Code (Act V of 1908), section 118—Security
for good behaviour—Reasons for rejecting sureties.*

In a case under section 118, Code of Criminal Procedure, a Magistrate rejected certain sureties on the ground that they did not live within a radius of five miles of the place where the accused person lived. *Held*, that the order was bad and there was no valid ground for rejecting the sureties.

CRIMINAL REVISION from an order of F. C. M. Cruickshank, Esq., Magistrate, First Class, of Terai and Bhabar, Naini Tal.

Satya Chandra Mukerji, for the applicant.

R. Malcomson (Assistant Government Advocate), for the Crown.

The facts will appear from the judgment of the court.

The following judgment was delivered by

Tudball, J.

TUDBALL, J.—The applicant, Hasin-ud-din, by an order of the Magistrate, dated the 11th of May, 1912, was ordered to give security for his good behaviour for three years in his own bond for Rs. 500 and two sureties for Rs. 500 each. He produced two sureties, Karim Bakhsh and one other. The Magistrate has rejected this security for

very peculiar reasons. His order runs as follows:—"The applicant, Karim Bakhsh, says he will keep Hasin-ud-din in his village but the other surety lives ten miles away at least from that village, and he is not present. Unless both the sureties live within a radius of five miles, I cannot allow this security." The order is by no means clear as to the centre from which the radius is to be drawn, whether that centre is to be the abode of the accused or of the sureties. Apparently there is no other defect in this security except that mentioned by the Magistrate, namely, that the sureties do not live within five miles of each other or of Hasin-ud-din. This is no valid ground whatsoever for rejecting the security which is good in other respects. I therefore allow this application, set aside the order of the Magistrate and direct that the security offered by the two sureties produced be accepted together with the bond of Hasin-ud-din and that he be forthwith released directly the bonds are filed.

Application allowed.

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1912.
Hasin-ud-din
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Tudball, J.

HARGOBIND

versus

KING-EMPEROR.*

CRIMINAL.
1912.
August, 1.
TUDBALL, J.

Public Gambling Act (III of 1867), sections 3 and 4—Presumption.

A warrant issued for the search of 'any house' which the police officer to whom it was issued might consider proper to search was an illegal warrant within the meaning of the Gambling Act, and any search made under it was not such as was contemplated by the Act. The result of the illegal act, however, is that no presumption whatsoever can be drawn in accordance with the Act such as is allowed by the terms thereof to be drawn in the case of a legal search. Evidence can be given to show that the house is a gaming house.

CRIMINAL REVISION from an order of G. O. Allen, Esq., Magistrate, First Class of Mirzapur.

A. P. Dube, for the applicant.

* Cr. Rev. No. 499 of 1912.

CRIMINAL.

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Hargobind

v

King-Emperor

Tudball, J.

R. Malcomson (Assistant Government Advocate), for the Crown.

The facts appear from the judgment delivered by

TUDBALL, J.:—The applicant in this case has been convicted under sections 3 and 4 of the Public Gambling Act and has been fined Rs 30. The two points taken before me are:—(1) That the search carried out by the police was entirely illegal, and, (2) that it is not proved that the house in question is a gaming house. In regard to the first point after examining the warrant I find it was issued apparently for the search of any house which the police officer to whom the warrant was issued might think proper to search. There can be little doubt that the warrant was entirely illegal and any search under it was not such as was contemplated by the Act. The result of this illegal search, however, is merely this, that no presumption whatsoever can be drawn in accordance with the Act such as is allowed by the terms thereof to be drawn in the case of a legal search. If, however, there is evidence on the record to establish that the house was a gaming house and that the present applicant was using it as such for his own profits, the legality of the conviction cannot be questioned. The evidence on the record is to the effect that the house in question belongs to one Mohan Kalwar. It was empty and unoccupied. This is to be gathered from the evidence of Bindeshri, one of the defence witnesses. The prosecution evidence shows that Zakir and Hargobind, the present applicant, with or without the permission of the owner were, as a matter of fact, using a room in this building for the purpose of gaming and that they were taking a portion of the winnings from the winners. The evidence is to the effect that when the police arrived gaming was going on. Sixteen *couries* were found on the ground. There was also a carpet on the ground. Candles and *chirag* were alight. A piece of chalk and a certain amount of cash was also recovered. But it is impossible to follow the train of thought in the Magistrate's mind when he said that the piece of chalk in the present case was an instrument of gaming, for there is nothing on the record to show that it was used for that purpose. It is urged that *couries* are not instruments of gaming *per se*,

and unless and until there is evidence to show that they were used as instruments of gaming, the court has no right to hold that they were such instruments. The evidence for the prosecution is to the effect that gaming was going on and that sixteen *couries* were on the ground. *Solahi* is a game which is played with sixteen *couries* and is a very common game in this country for the purpose of gambling, though it would have been better if the Magistrate had made the point perfectly clear by examination of witnesses. Still the circumstances of the case place it beyond doubt that the game which was being played was a game of *solahi* for which *couries* are used as instruments of gaming. In my opinion, therefore, the evidence on the record is sufficient to enable the Court to hold that the applicant was using the house in question as a gaming house deriving profits therefrom, and the *couries* were instruments of gaming and were being used as such. In these circumstances I do not deem it necessary to interfere at all in this case. The application is dismissed.

Application dismissed.

CRIMINAL
1912.
Hargobind
v.
King-Emperor.
Tudball, J.

RAM KISHAN DAS

versus

KING-EMPEROR.*

Criminal Procedure Code (Act V of 1908), section 526—Circumstances under which transfer allowed.

CRIMINAL
1912.
August, 5.
RAFIQ, J.

What the court has to consider in an application to transfer a criminal case is not merely whether there has been a real bias in the mind of the presiding Magistrate against the accused but also the further question whether incidents may not have happened which, though susceptible of explanation, and which would perhaps pass unnoticed but for the trial he is undergoing would alarm him and lead him to think that his conviction is a foregone conclusion. Where, therefore, the District Magistrate refuses an interview to an accused person and cancels his license to carry arms though the circumstances are not enough to show that the Magistrate is prejudiced against the accused yet are sufficient grounds for transfer from the district.

Farzand Ali v. Hanuman Prasad, I. L. R., [1896] 19 All., 64, followed.

* Cr. Mis. No. 135 of 1912.

CRIMINAL.

1912.

Ram Kishan

Das.

v.

King-Emperor.

APPLICATION for transfer under section 526 of the Code of Criminal Procedure.

Saiya Chandra Mukerji, for the applicant.

A. E. Ryves (Government Advocate), for the Crown.

The facts appear sufficiently from the judgment of the court.

The judgment of the Court was delivered by

Rafiq, J.

RAFIQ, J.:—The applicant, Mahani Ram Kishen Das of Akhara Ram Bagh, Sub-division Karwi, has filed three applications in this Court under section 526 of the Code of Criminal Procedure, with regard to three criminal cases pending against him in the court of the Joint Magistrate of Karwi, praying that those cases be transferred to some other court outside the district of Banda on the allegation that the district authorities are prejudiced against him. The Mahant stands charged with the offences of rash and negligent driving, enticing away of a married woman with criminal intent and committing riot in the course of the abduction of the woman. The allegations on which the transfer is sought are to put briefly : (1) that on the 5th of June, 1912, the Joint Magistrate at first refused to see the applicant and when on the latter's repeated request an interview was allowed, the Joint Magistrate told him that the applicant was a *badmash* and ordered him to go away ; (2) that the Joint Magistrate has sanctioned the prosecution of the applicant for rash and negligent driving ; (3) that the Joint Magistrate received information of the alleged abduction at his bungalow in the middle of the night of the 27th of June, 1912; and went at once to the Railway station and issued orders to the police to make enquiry ; (4) that the District Magistrate of Banda cancelled the applicant's license for arms and declined to see him when he called to pay his respects on the 8th of July, 1912. No explanation appears to have been submitted by the Joint or the District Magistrate in reply to the allegations of the applicant. The learned Government advocate appears to oppose the applications for transfer. He says that he does not oppose the transfer from the court of Mr. Muir, the Joint Magistrate, not because the allegations made against him are true, but because the defence might possibly call him as a witness in

the abduction case. In the case of transfer from the District Magistrate's court he opposes it strenuously on the ground that no case has been made out for imputing prejudice to the District Magistrate. For the applicant it is contended that what the court has to consider on an application for transfer is "not merely the question whether there has been a real bias in the mind of the presiding Magistrate against the accused but also the further question whether incidents may not have happened which, though they may be susceptible of explanation and may have happened without any real bias in the mind of the Magistrate, are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial." The withdrawal of the applicant's license for arms and the Magistrate's refusal to see the applicant before he was found guilty by a court of law are circumstances, it is said, which are calculated to create in the mind of the applicant a reasonable apprehension that he may not have a fair and impartial trial. In support of his contention the learned counsel for the applicant relies on a case of this Court, namely, *Fazand Ali v. Hanuman Prasad* (1). The learned Government advocate replies that the cancellation of the license for arms is a matter purely discretionary with the Magistrate and his refusal to see a man who is standing his trial in a criminal court is not improper, and that neither circumstance implies a prejudice in the mind of the Magistrate, nor can it be said to create a reasonable apprehension in the mind of an ordinary man that he would not have a fair and impartial trial at the hands of the Magistrate. Moreover, it is said that the case of *Fazand Ali v. Hanuman Prasad* has not, as a rule, been followed in this Court. The correctness of the order of the Magistrate cancelling the license for arms, or the propriety of his conduct in refusing an interview to the applicant is not and could not be in question in the present application. Nor is it contended by the learned counsel for the applicant that the District Magistrate is, as a matter of fact, prejudiced against the applicant. What is advanced for the applicant and has to be considered is whether the said two circumstances would create in the mind of the

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(1) [1896] I. L. R., 19 All., 64.

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applicant a reasonable apprehension of not getting a fair and impartial trial in the court of the District Magistrate. The position of an accused person is always one of great anxiety and suspense, and incidents, though susceptible of explanation, and which would perhaps pass unnoticed, but for the trial he is undergoing, alarm him and lead him to think that his guilt is already believed and that his conviction is a foregone conclusion. It is quite possible that such an impression has been produced in the mind of the applicant by the circumstances referred to above as they very likely led him to infer that the District Magistrate was displeased with him. It would, therefore, be advisable to grant the applicant's request for transfer. The suggestion that the principle enunciated in the case of *Faisand Ali v. Hanuman Prasad*, has not been followed in this Court has no force, as I find on similar considerations transfers were allowed in the following cases, namely, *Krishna Nath Tewari v. King-Emperor* ⁽¹⁾; *Inayat Ali Khan v. King-Emperor* ⁽²⁾; and *Mohammad Fasal Ullah v. King-Emperor* ⁽³⁾. I think it is expedient in the ends of justice that the three cases pending against the applicant in the court of the Joint Magistrate of Karwi should be transferred to another district. I am told that Allahabad is as far from Manikpore where most of the witnesses live as Banda is, and that it would be convenient to both parties to have the case tried in Allahabad. I order that the three cases, against the applicant, be transferred from the court of the Joint Magistrate of Karwi to that of the District Magistrate of Allahabad, who will either try the cases himself or send them for trial to some other Magistrate subordinate to him competent to try them.

Application allowed.

(1) Decided on the 23rd of March, 1910.

(2) Decided on the 18th of October, 1910

(3) Decided on the 1st of April, 1912.

DEBI PRASAD
versus
 KING-EMPEROR.*

Criminal Procedure Code (Act V of 1908), section 195 (c)—Complaint.

A Munsif found that a document filed in a case before him was tampered with. He wrote to the District Judge who wrote to the District Magistrate to take action in the matter. *Held* that the letter of the District Judge was a complaint within the meaning of section 195(c), Criminal Procedure Code. *Emperor v. Sunder Sarup*, 1 L. R., 26 All., 514, followed.

APPLICATION for transfer of the case.

Nehal Chand, for the applicant.

A. E. Ryves (*Government Advocate*), for the Crown.

The facts of the case will appear from the following judgment which was delivered by

RAFIQ, J.—It appears that in a case pending in the court of the Munsif of Havali in the district of Bareilly a document was tampered with. The learned Munsif reported to the District Judge about the tampering of the document. The latter wrote to the District Magistrate to take action in the matter. The case was made over to the Joint Magistrate of the district for trial. The applicant, who is one of the accused in the case, has filed this petition under section 439 of the Code of Criminal Procedure, for revision of the proceedings pending in the court of the Joint Magistrate. It is contended on his behalf that the Joint Magistrate has no jurisdiction to try the applicant and the other accused inasmuch as no complaint according to law has ever been filed. It is argued that the letter of the District Judge to the District Magistrate in the absence of any proceedings under section 476 of the Code of Criminal Procedure does not fall within the definition of a complaint, and that section 195, clause (b) of the Code of Criminal Procedure, has no application. In support of this contention the learned counsel has cited, *In the matter of the petition of*

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Mathura Das⁽¹⁾ and *In Re Lakshmidas v. Lalji*⁽²⁾. A later decision of this court, *vis.*, *Emperor v. Sundar Sarup*⁽³⁾,

covers the present case. The application is therefore rejected.

(1) [1892] I. L. R., 16 All., 80. (2) [1907] I. L. R., 32 Bom., 184.

(3) [1904] I. L. R., 26 All., 514.

Application rejected.

KAMLA PRASAD

versus

KING-EMPEROR.*

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RAFIQ, J.

Penal Code (Act XLV of 1860), section 290—Public nuisance—Placing a charpoy temporarily on road.

Held, that placing a *charpoy* temporarily on the road in a *bazar*, without any intention of obstructing traffic, does not amount to the offence of causing public nuisance

CRIMINAL REFERENCE made by F. D. Simpson, Esq., Sessions Judge of Gorakhpur.

The facts of the case appear sufficiently from the judgment of the Court.

M. L. Agarwala, for the appellant.

The following judgment was delivered by

Rafiq, J.

RAFIQ, J.—This is a reference made by the learned Sessions Judge of Gorakhpur, under section 438 of the Code of Criminal Procedure, recommending that the conviction of one Kamla Prasad, under section 290 of the Indian Penal Code, be set aside and the sentence of fine be remitted. The circumstances which gave rise to the prosecution of Kamla Prasad are as follows :—Kamla Prasad is a *karinda* of the Rani of Gopalpur. A *bazar* is held at a place called Gola, which, it is said, is comprised in the zamindari of the Rani. In the afternoon of March 26th, 1912, the second officer of the police station of Gola was passing through the *bazar* on an *ekka*. He found a crowd in the *bazar* which intercepted his further progress. On dispersing the crowd, it was dis-

* Cr. Ref. No. 495 of 1912.

covered that Kamla Prasad was sitting on a *charpoy* in the middle of the road and there were two chairs, one on each side of the *charpoy* occupied by the friends of Kamla Prasad. On demand by the Sub-Inspector, the *charpoy* and the chairs were removed and the Sub-Inspector proceeded on his way in the *ekka*. Kamla Prasad was subsequently prosecuted under section 290 of the Indian Penal Code on the charge of causing a public nuisance by keeping a *charpoy* in the middle of a road. Kamla Prasad denied the charge and pleaded that he was sitting at a place close by the shop of one Faqir Meah. The learned Magistrate, however, disbelieved Kamla Prasad and convicted him under section 290 of the Indian Penal Code and sentenced him to pay a fine of Rs. 15. Kamla Prasad applied to the learned Sessions Judge of Gorakhpur for revision. The learned Judge has submitted the case to this Court, being of opinion that the conviction of Kamla Prasad was bad in law. It may be taken as proved in this case, that Kamla Prasad was sitting on a *charpoy* on the road in the *basar*, but the question is whether this act falls under section 290 of the Indian Penal Code. I agree with the learned Judge that the act of Kamla Prasad in placing a *charpoy* on the road in the *basar* temporarily, did not amount to the offence of causing public nuisance. The learned Magistrate in his explanation has referred to three cases in support of his order. *In re Umesh Chander Kar*⁽¹⁾, *Queen-Empress v. Virappa Chetti*⁽²⁾, *Rex v. Lord Grosvenor and others*⁽³⁾. Those cases are not on all fours with the present case. In all those cases the obstruction was of a permanent nature. As remarked by the learned Judge, it is a common thing in this country for persons to place their *charpoys* on the public roads without any intention of obstructing traffic. It is not quite clear from the record whether the passage of the *ekka* of the Sub-Inspector was obstructed by the crowd or by the *charpoy* of Kamla Prasad or by both. I, therefore, accept the reference, set aside the conviction and sentence, and direct that the fine, if realised, be refunded.

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Reference accepted.

(1) [1887] I. L. R., 14 Cal., 656.

(2) [1896] I. L. R., 20 Mad., 433.

(3) [1819] 2 Starkie, 511.

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SAJJAD ALI KHAN AND ANOTHER,

versus

WAZIR ALI KHAN AND OTHERS.

Deed—pardanashin lady—Burden of proof—Practice—Code of Civil Procedure (Act XIV of 1882), section 596—Concurrent findings of fact—Question of law—Elementary materials for arriving at conclusion not set out in the judgment.

It rests upon those founding upon a deed granted by a *pardanashin* lady to establish that she understood its effect and that the deed was intelligently and properly executed by her.

Tacoordeen Tewarry v. Nawab Syed A i Husain Khan, [1874] L. R., 1 I. A., 192, at p. 206; S. C., 13 B. L. R., 427.

Shambati Koori v. Jago Bibi, [1902] L. R., 29 I. A., 127, at p. 131; S. C., 1 I. L. R., 29 Cal., 749, followed.

Where in an appeal the findings of fact were concurrent, but it was contended that a question of law was involved, *vis*, that the judgment of the trial Judge showed that he had misdirected himself inasmuch as certain materials for arriving at a conclusion had not been set out in the narrative which the judgment contained:

Held, that those materials were of the most elementary character and there was no ground for suggesting that the Judge had not taken them into consideration:

Held, also, that it would be to misconstrue entirely the provisions of section 596 of the Code of Civil Procedure (Act XIV of 1882), as to concurrent findings of fact if the Judges of India were to have impliedly the duty laid upon them of making their narrative of the circumstances minutely and completely exhaustive, under the penalty that if they failed to do so, the absence from their mind of elementary considerations might be presumed.

Karuppanan Servai v. Srinivasan Chetti, [1901] L. R., 29 I. A., 38; S. C., 1 I. L. R., 25 Mad., 215, followed.

APPEAL from a decree of the court of the Judicial Commissioner of Oudh, modifying a decree of the Subordinate Judge of Lucknow.

The suit was brought on April 1st, 1905, praying for a declaration that all the property comprised in three deeds

of endowment, dated respectively, December 4th, 1886, March 7th, 1898, and November 13th, 1902, was *waqf-nama*. The plaintiffs (the present appellants) sued as trustees under the said deeds and prayed for possession. The Subordinate Judge dismissed the suit as regards all the property to which it related. The Judicial Commissioner affirmed that decree as regards the property comprised in the deed of November 13th, 1902, but allowed the appeal and granted the plaintiffs a decree as regards the two earlier deeds. The respondents did not file a cross-appeal, but the appellants prayed in their appeal that the third deed of endowment might also be upheld.

The plaint alleged that Mehdi Begam was the settlor in respect of the deed of November 13th, 1902, executed the deed on that day, registered it on the next, and died on February 4th, 1903. The trustees thereupon took possession and began to discharge the trust duties; but that the first defendant, Abid Husain Khan, obtained a succession certificate in respect of the movable estate as property left by the deceased and mutation of names in respect of the villages in his favour as heir to the deceased Mehdi Begam. It was also alleged that nevertheless he did not obtain actual possession until September 17th, 1904.

With regard to the third deed of endowment the first defendant in his written statement did not admit its execution, and claimed to be in possession of the properties comprised therein by right of inheritance, that is, as brother and sole heir to Mehdi Begam. He pleaded that Mehdi Begam's intellect "was not in proper order and she was incapable of understanding transactions"; and that even if the said deed of endowment be proved, "it is not valid according to Mahomedan law."

It had been concurrently found that the deed of November 13th, 1902, was executed and registered by Mehdi Begam, deceased, the then proprietor of the properties comprised therein. The Subordinate Judge found that "its intelligent execution by her has not been found. In my opinion the document is not such as should be given effect to. Proof of a mere formal execution by an illiterate *pardanashin* in favour

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of her Mukhtar is wholly insufficient." He also found that "no change was brought about in revenue records to show a change in the nature of the possession." The Judicial Commissioner found that "it has not been proved that when Mehdi Begam executed the *waqfnama*, she understood its provisions or its effect upon her interests." He also found "Mehdi Begam was an illiterate *pardanashin* woman separated from her husband under circumstances which are stated in I. L. R., 21 Cal., 135. The effect of the deed of 1902, if valid, appears to have been to strip her of almost all her property for it left her in possession of some movable property not shown to have been of any great value, and a *wasika* and pension which brought her in less than Rs. 40 per mensem. The deed was registered not at her house where she lived with her brother but at the *Rouza*. Under these circumstances any one who relies upon the deed must prove that she understood its effect upon her position and probably also that she had independent advice".

The plaintiffs appealed to His Majesty in Council.

Sir Erle Richards, K. C. and *G. E. A. Ross*, for the appellants: When a deed is executed by a *pardanashin* lady about whom nothing is known, the courts would be most careful in ascertaining that she understood the contents of the deed in question and knew its effects, and the burden of proof would be on those who rely on the deed. But when it is shown that the deed is executed by a lady, who, though *pardanashin*, is intelligent and is a lady of business habits and experience, and who had executed similar deeds before, as in this case, the burden of proof is on those who challenge the deed to show that the lady in question did not, in fact, understand the contents and effects of the deed.

Prince Mirza Suleman Kaab v Nawab Mehdi Begam Surreya Bahu, [1893] L. R., 20 I. A., 144; I. L. R., 21 Cal., 135,

shows that Mehdi Begam was a lady of business habits. The deed executed in 1898 is admitted. The deed in question, which was executed four years later, is in practically the same terms as those of the previous deed. It is a transaction which a right-minded person could be expected to do. It originated from the lady and did not require any indepen-

dent legal advice. It is not improvident. The submission, therefore, is that it should be upheld on the authority of

Mahomed Buksh Khan v. Hosseini Bibi, [1888] L. R., 15 I. A., 81, s. c. I. L. R., 15 Cal., 684.

Reference was also made to

Hakim Muhammad Ikramud-din v. Nijiban, [1898] L. R., 25 I. A., 137; s. c. I. L. R., 20 All., 447

[*DeGruyther*: There are concurrent findings of fact that it has not been proved that the lady understood the contents and effects of the deed.]

It is a question of law, *viz.*, on whom lies the *onus* in this case. Under the circumstances of this case the *onus* rests on the respondents to show that the lady did not understand the provisions of the deed and their effect. The courts below have laid the *onus* on the appellants, and it is submitted that the findings arrived at on that basis are not binding on the Board.

Tacoordeen Tewarry v. Nawab Syed Ali Hossein Khan, [1874] L. R., 1 I. A., 192; s. c. 13 B. L. R., 427.

Ashgar Ali v. Delroos Banoo Begum, [1877] 1 L. R., 3 Cal., 324.

Sudisht Lal v. Mussammat Sheobarat Koer, [1881] L. R., 8 I. A., 39; s. c. I. L. R., 7 Cal., 245,

Shambati Koeri v. Jago Bibi, [1902] L. R., 29 I. A., 127; s. c. I. L. R., 29 Cal., 749.

were distinguished on the facts.

DeGruyther, K. C., (*H. Cowell* with him), for the respondents. The appellants have brought the present action of ejectment claiming under the deed of 1902. They sue as trustees, but a plaintiff suing as trustee in an action of ejectment is not put on a different footing from a plaintiff who sues for his own benefit. The appellants must, therefore, succeed on the strength of their title.

The London Joint Stock Bank v. Simmons, [1892] L. R. A. C. 201, 203 and 208.

was referred to,

Appellants' title is based on the deed of 1902, which was executed by a *pardanashin* lady, and it is settled law, which has never been departed from that those who rely upon such

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a deed must satisfy the court that it had been explained to and understood by the lady :

Shambati Koeri v. Jago Bibi, [1902] L. R., 29 I. A., 127, at p. 131. (*supra*).

Whether that *onus* is discharged, that is, whether the court is satisfied on the evidence in the case that the contents of the deed were explained to the lady and that she understood them, is a pure question of fact.

Both courts have agreed in finding that fact against the appellants. The rules against disturbing a concurrent finding of fact by the courts below is none the less applicable because the courts have not taken precisely the same view of the weight to be attached to the oral and documentary evidence respectively :

Ram Anugra Narain Singh v. Chowdhry Hanumam Sehai, [1902] L. R., 30 I. A., 41, at p. 43 ; S. C. I. L. R., 30 Cal., 303.

Unless it be shown with absolute clearness that some blunder or error is apparent in the way in which the courts below have dealt with the facts, it is the practice of the Board not to reverse concurrent findings :

Allen v. Quebec Warehouse Company, [1886] L. R., 12 A. C., 101, at p. 104.

The lower appellate court ought not to have given leave to appeal in this case :

Karuppanan Servai v. Srinivasan Chetti, [1901] L. R., 29 I. A., 38 ; S. C. I. L. R., 25 Mad., 215.

There is no question of law involved in the appeal.

The judgment of their Lordships was delivered by

Lord Shaw.

LORD SHAW.—This is an appeal from a judgment and decree of the court of the Judicial Commissioner for Oudh, dated the 27th March, 1907, modifying a decree of the Subordinate Judge of Lucknow, dated the 30th March, 1906. The suit was brought on the 1st April 1905.

It prayed for a declaration that all the property comprised in three deeds of endowment was *wakf*, that is to say, was endowed property, and the plaintiffs (the present appellants) as trustees under these deeds prayed for possession. The claim in short was, as stated, a "claim for possession of *wakf* property by right of trusteeship."

The claim of the appellants was dismissed by the Subordinate Judge in its entirety. Upon appeal, the appellate court upheld this decree with respect to the property comprised in one of the three deeds of endowment, *vis.*, that of 13th November, 1902, and reversed it with respect to the property included in the other two deeds. That is to say, the endowments under these two deeds were held good.

The only question raised in the present appeal has reference to last endowment, *vis.*, that constituted by the deed of 1902. The preceding deeds, one dated in 1886 and one in 1898, were somewhat limited in their character, and the defendant's contention under which these deeds were attacked is not now further insisted on.

Many years ago, a tomb, or, more properly speaking—as their Lordships are informed—a mausoleum was erected in the city of Lucknow by one Madad Ali, now dead; and in 1886 he made a *wakf* of certain property for the upkeep of the mausoleum and the performance of religious observances in connection therewith. By the deed of endowment Mehdi Begam was appointed one of two trustees, and upon the death of her co-trustee in 1899 she continued to manage the property alone. In March, 1898, she executed a document whereby she purported to add to the endowment, and she appointed the first plaintiff and her brother, the first defendant, to be trustees of the original and added property. There appears to be no doubt that Mehdi Begum was much interested in the mausoleum and in its endowments, its upkeep, and its services. She died on the 4th February, 1903, having on the previous 13th day of November, executed another deed—that with regard to which the parties are now in contention.

Mehdi Begam was a *pardanashin* woman; she was separated from her husband, she was unable to read or write, and she was possessed at the date of the deed which is questioned of a fortune of about Rs. 50,000. It is not disputed that in the ordinary case of a deed granted by a *pardanashin* lady, it rests upon those founding upon the document to establish that she understood its effect and that the deed was intelligently and properly executed by her.

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The *wakf* is undoubtedly of a comprehensive character. It proceeds upon the following narrative :—

"Whereas this world is unstable and no reliance can be placed on this borrowed life, and after death there remains no trace either of soul or body, and whosoever has come to this world from non-existence will be completely annihilated one day, according to the proverb 'all that lies over it is mortal'; but through good and charitable deeds, or from one's male issue, if he is good and obedient, the continuance of one's name is possible. I, the declarant, have no issue of any kind from whom I may hope for the endurance of my name, consequently it seems proper to incline myself to the performance of good deeds."

The deed thereupon proceeds to endow :—

"With possession in the name of the undermentioned places in my lifetime in connection with the *Rouza* and for its maintenance, stability, and expenses, and also for sending people to Kaibala and other holy places, as detailed below, my personal, moveable and immovable property, as specified hereafter, valued at Rs. 50,000."

She constituted herself as *Mutawalli*, that is, as the manager of the religious endowment, and she appointed her brother and her general agent as trustees. Among the succeeding clauses the following appears to be important :—

"That the trustees shall in my lifetime, as well as after my death, continue to manage the undermentioned things just like myself, and the carrying out of the undermentioned things and of the above conditions shall also be binding and incumbent on me, as it is incumbent according to the *Imamia* law. And for my livelihood my *waska* and pension are sufficient."

That pension amounted, as is admitted, to somewhere under Rs. 40 per month. Power is given for collection of the income of all property conveyed, such collection to rest only in the general agent, who was one of the trustees.

The document may be described shortly as an *inter vivos* conveyance, taking effect *de presenti* and stripping the lady of all her possessions, except to the extent of the reservation made to herself of her pension of Rs. 40 per month. It appears to their Lordships that the deed accordingly is of a character justifying a strict and careful application of the rule operating for the protection of *pardanashin* women and demanding affirmative proof on the subject of their intelligent understanding and execution of deeds attributed to them. This view is strengthened by the marked contrast which exists between this document of 1902 and the previous Deed of

Endowment of 1898, which was limited in its scope, was purely testamentary, and expressly reserved powers of management of all the affairs of the endowed property to the lady herself, with power of amending and cancelling the endowment.

- “ According to the principles which have always guided the courts in dealing with sales or gifts made by ladies in such a position (*pardanashin* ladies), the strongest and most satisfactory proof ought to be given by the person who claims under a sale or gift from them, that the transaction was a real and *bona fide* one and fully understood by the lady whose property is dealt with.”

This is the language of Sir MONTAGU SMITH in *Tacoor-deen Tewarry v. Nawab Syed Ali Husain Khan* ⁽¹⁾, and is still the law. In the words of Sir ANDREW SCOBLE in *Shambati Koeri v. Jago Bibi* ⁽²⁾ :—

“ It is a well-known rule of this Committee that in the case of deeds and powers executed by *pardanashin* ladies, it is requisite that those who rely upon them should satisfy the court that they have been explained to and understood by those who executed them.”

Accordingly, the one and only question in this case is ;— the burden of proof being thus placed, has it been discharged by the party upon whom it rests? In their Lordships' opinion, Mr. DeGruyther was justified in founding upon the concurrent findings in fact of the courts below. The Subordinate Judge, having heard the evidence, says :—

“ It does not satisfy me that Mehdi Begam intelligently understood the deed on which she was placing her seal, and knew at the time its effects upon her rights as owner of the property comprised in the deed.”

It is unnecessary to go into the details as to the alleged execution of the document in the *zenana*, as to whether certain witnesses knew the voice of the executant, as to whether the deed in point of fact was read, or was read in circumstances giving any indication of its appreciation by the grantor. The finding of the Subordinate Judge is as stated. In the judgment passed by the court of the Judicial Commissioner of Oudh the opinion expressed was as follows :—

“ It has not been proved that when Mehdi Begam executed the *waqf-nama* she understood its provisions or its effects upon her interests.”

(1) [1874] I. A., 206.

(2) [1902] 29 I. A., 131.

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By section 596 of the Civil Procedure Code (Act XIV of 1882), it is specifically provided as follows with reference to appeals to His Majesty the King in Council :—

“Where the decree appealed from affirms a decision of the Court immediately below the court passing such decree, the appeal must involve some substantial question of law”

Their Lordships put to the learned counsel for the appellants what question of law was here involved, and it was replied that, while the findings of fact were concurrent, the judgment of the Subordinate Judge showed that he had misdirected himself. It turned out that this was rested upon the ground that in the course of a long judgment certain materials for arriving at a conclusion had not been set out in the narrative which the judgment contains. These materials were of the most elementary character; and their Lordships are of opinion that there is no ground for the suggestion that the Subordinate Judge had not taken them into account. It would be to misconstrue entirely the provisions as to concurrent findings in fact if the Judges of India were to have impliedly the duty laid upon them of making their narrative of the circumstances minutely and completely exhaustive, under the penalty that if they failed to do so, the absence from their mind of elementary considerations might be presumed.

The courts below accordingly having concurrently found that the facts which it lay upon the appellants to establish were not proved, it appears to their Lordships that this is to all intents and purposes a concurrent finding on a matter of fact, and that accordingly such a finding cannot be disturbed. The rule so clearly laid down by Lord MACNAGTEN in *Karuppanam Servai v. Srinivasa Chetti* (1), should be followed.

Their Lordships will accordingly humbly advice His Majesty that the appeal should be dismissed with costs.

W. W. Bax & Co., Solicitors for the appellants.

T. L. Wilson & Co., Solicitors for the respondents.

J. M. P.

Appeal dismissed.

(1) [1902] 29 I. A., 39.

MOHAMMAD MEHDI HASAN KHAN,

versus

MANDIR DAS.

*Evidence Act (I of 1872), section 114—Presumption—Burden of proof—
Mortgage-suit—Production by defendant of bond with endorsement
of payment—Decision cannot be founded on suspicion.*

In view of the presumption under section 114 of the Indian Evidence Act (I of 1872) the production by the defendant of the mortgage-bond, on which the suit is based, with the endorsement of payment casts on the plaintiff the burden of establishing the affirmative proposition that the debt is still outstanding, in other words, of showing that the bond came in the defendants' possession by dishonest means and that the signature to the endorsement was either a forgery or, in case the endorsement is signed by an agent, unauthorised.

It is a settled principle that suspicion, though a ground for scrutiny, cannot be made the foundation of a decision. *Query*: Whether any question of *onus* remained after the parties had gone into evidence.

TWO CONSOLIDATED APPEALS from a judgment and decree of the court of the Judicial Commissioner of Oudh, which set aside a decree of the Subordinate Judge of Bara Banki.

The suit was brought by the plaintiff, Sri Mandir Das, to recover from the defendant Rs. 62,717-2-3 on the basis of a mortgage bond, dated the 22nd of December, 1898. The defendant produced the bond containing the endorsement of payment, and the Subordinate Judge made an interlocutory order as follows:—

"Taking the provisions of section 114, Act I of 1872, into consideration, I am of opinion that the *onus* lies on the plaintiff to prove that the bond has not been discharged."

In the result the Subordinate Judge held that the plaintiff failed to discharge the *onus* that lay on him and dismissed the suit. On appeal, the court of the Judicial Commissioner dealt with the evidence "on the assumption that the *onus* of proving payment is on the defendant" and decreed the claim of the plaintiff, but did not award the full amount of interest claimed. Both parties appealed to His Majesty in Council, and their appeals were consolidated.

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G. E. A. Ross, for the defendant, submitted that the Subordinate Judge was right in holding that the *onus* was on the plaintiff to prove that the bond had not been discharged: See

The Indian Evidence Act, 1872, section 114, Illustration (1).

The court was entitled to presume the fact of the payment unless and until it is disproved:

Section 4 of the same Act.

Both courts agree in disbelieving the plaintiff's witnesses and the said suit should, therefore, be dismissed.

Section 34 of the Indian Evidence Act was also referred to.

The plaintiff did not appear.

The judgment of their Lordships was delivered by

Mr. Ameer
Ali.

MR. AMEER ALI:—These are two consolidated appeals from a judgment and decree of the Judicial Commissioners of Oudh, dated the 31st of July, 1907, and arise out of a suit brought by the plaintiff in the court of the Subordinate Judge of Bara Bānki, on the basis of a mortgage-bond executed by the defendant, Chowdhri Mehdi Hasan, on the 22nd of December, 1898, in favour of one Sukh Dei, since deceased. It appears that Sukh Dei carried on in her lifetime a money-lending business, and that the plaintiff has obtained a succession certificate under Act VII of 1889, to collect the debts due to her estate. The present action was launched on the 16th of February, 1906, for the recovery of over Rs. 62,000, principal and interest, by the sale of the mortgaged premises. At the time of the institution of the suit the plaintiff produced only a copy of the document, alleging that the original had been lost. The defendant in his answer admitted its execution, but alleged that the debt was discharged. In support of his allegation he produced the original document containing the endorsement of payment by Sukh Dei and her general agent, Bansidhar.

In view of the presumption embodied in section 114 of the Indian Evidence Act (I of 1872), the Subordinate Judge was of opinion that the burden of establishing that the obligation created by the bond was still outstanding lay on the plaintiff. Their Lordships consider this to be the real meaning of the issue framed by him on the 6th of September,

1906, after argument. The plaintiff accepted the *onus* and obtained an adjournment for the production of evidence in rebuttal of the presumption arising from the possession of the document by the defendant. The hearing of the case was resumed in January, 1907, and the plaintiff examined a number of witnesses to prove that the defendant had dishonestly obtained possession of the bond after Sukh Dei's death through the instrumentality of Bansidhar. He also attempted to establish that Sukh Dei was not at Bara Banki on the date of the alleged payment. The defendant then went into evidence regarding the fact of payment and the delivery of the document to his servants on his behalf. The Subordinate Judge disbelieved the plaintiff's witnesses. With regard to the defendant's evidence, he observed as follows :—

"I would have hesitated in believing the testimony of defendant's witnesses also, had it not been corroborated by the facts that the bond bearing an endorsement of payment was filed from the defendant's custody, and it was stated by plaintiff's own witnesses that the said endorsement was in the hand-writing of Sukh Dei's general agent, Bansidhar."

In the result the Subordinate Judge dismissed the suit with costs.

From this decree the plaintiff appealed to the court of the Judicial Commissioner of Oudh. The learned Judges who heard the appeal were of opinion that at the trial the *onus* had been wrongly thrown on the plaintiff. In this view the learned Judge who delivered the principal judgment proceeded to examine in the first instance the evidence produced by the defendant and came to the conclusion that it was not reliable. He then considered the testimony of the plaintiff's witnesses and was of opinion that it was false. As regards the fact that the document on which the suit was based was in the possession of the defendant, and produced by him with the admitted endorsement of Sukh Dei's general agent, he held that it must have come into the defendant's hands by some dishonest means. He accordingly reversed the decision of the first court and decreed the plaintiff's claim; and his learned colleague concurred in this judgment. The defendant has appealed to His Majesty in Council and there is a cross appeal by the

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plaintiff on the question of interest disallowed by the learned Judges in the court below. But he has not appeared either in support of the judgment in his favour or to argue his own appeal.

Their Lordships after a careful consideration of the case have come to the conclusion that the judgment and decree of the Judicial Commissioners cannot be sustained.

Assuming that any question of *onus* remained after the parties had gone into evidence, and that it lay on the defendant to establish the allegation of payment, he appears to have proved facts which strongly support the presumption of law arising from the possession of the bond.

He showed that the endorsement of payment on the document was in the hand-writing of Bansidhar, who, it is admitted, was the "recognised" and general agent of Sukh Dei and held a power of attorney from her, and that it bore his signature. The defendant also produced a letter of demand on behalf of Sukh Dei, dated some seventeen days before the date of the alleged payment, signed by Bansidhar. He proved further that this Bansidhar used to give acquittances on Sukh Dei's behalf. Matadin, who, according to the plaintiff's own witnesses, is the defendant's treasurer, states that he and two other fellow servants carried the money to Sukh Dei's house, and that she after payment signed the document in Hindi in his presence below the endorsement written by Bansidhar and returned it to him. There is not a trace of cross-examination in the evidence of this witness with regard to the genuineness of Sukh Dei's signature. That statement remains uncontradicted, for no attempt, so far as their Lordships can see, was made to re-call the plaintiff's witnesses to say the alleged signature of Sukh Dei was not in her hand.

To meet the case made by the defendant, the plaintiff produced three classes of testimony. He attempted to show that the defendant was heavily involved in debt at or about the time of the alleged payment, and he wished the court to draw from this circumstance the inference that repayment was unlikely. The Trial Judge very properly, in their Lordships' opinion, observed that the fact of the defendant's indebtedness "in itself would not go to prove that he did not

repay the debt in question." And he referred to the evidence of one of the plaintiff's witnesses to show that the defendant was in funds in June, 1902, and repaid other debts.

The real and substantial case put forward by the plaintiff was of a two-fold character—first, that the bond was dishonestly and fraudulently made over to the defendant by Bansidhar after Sukh Dei's death; and, secondly, that Sukh Dei was not at Bara Banki on the date of the alleged payment. It is to be remarked that, although a book was produced by a Pujari, whom the Subordinate Judge calls 'a tutored and untruthful witness', to prove Sukh Dei's absence from Bara Banki, no attempt was made by the plaintiff to produce her *mahajani* books of account regularly kept in the course of business.

The Subordinate Judge disbelieved the story told by the plaintiff's witnesses and the appellate court agreed with him in holding that their testimony was worthless. But it has built up a theory of its own, based chiefly on surmises, regarding the manner in which the bond came into the possession of the defendant. The gist of the appellate court's judgment is to be found in the following statements, which also show how the learned Judges have looked at the case. Referring to the testimony of the plaintiff's witnesses, they say :—

"Worthless as this evidence is, it does not in any way make the defendant-respondent's case more probable. In the view that I have taken of the evidence of payment, it is difficult to account for the possession of the bond on the part of the defendant; yet there are documents on the record whence it may be inferred that some person for his own ends laid his hands on the document soon after the death of Musammat Sukh Dei and that through him it came into possession of the defendant."

And after referring to the disputes among Sukh Dei's relations after her death, they go on to say :—

"The plaintiff's inability to account for its disappearance no doubt suggested to him the reprehensible course of procuring false evidence, but when the question is considered whether the possession of the endorsed bond on the part of the defendant raises a presumption of payment, due weight should be attached to the possibility during this state of confusion of some person purloining the bond or even of its being lost and afterwards found and coming into the defendant's possession."

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Their Lordships cannot help considering this mode of treating a case where two distinct and conflicting sets of facts are opposed to each other as unsatisfactory. The plaintiff came into court with a definite story to account for the possession of the document by the defendant. The learned Judges agree with the first court in holding that story to be false, and yet they proceed to build up a case for the plaintiff on what they call a "possibility". As already observed, the defendant did not rest his case merely on the legal presumption which arose from the possession of the document; he produced positive testimony which received corroboration from that presumption, and he proved facts which made his statement probable. The learned Judges having disbelieved the evidence on both sides, have set aside the presumption under section 114 of the Evidence Act, which only embodies the ordinary rule of law, by a possibility based on surmises. Now, it is a settled principle that suspicion, though a ground for scrutiny, cannot be made the foundation of a decision, and that is exactly what appears to have happened in this case.

With reference to the conflicting views of the two courts in India regarding the question of *onus*, in view of the presumption under section 114 of the Indian Evidence Act, their Lordships are of opinion that the Subordinate Judge was right in holding that the production by the defendant of the bond with the endorsement of payment cast on the plaintiff the burden of establishing the affirmative proposition that the debt was still outstanding, in other words, of showing that the bond came in defendant's possession by dishonest means and that the signatures to the endorsement were either forgeries or unauthorised.

On the whole their Lordships are of opinion that the judgment and decree appealed against should be set aside and the plaintiff's suit dismissed with costs in all the courts. And they will humbly advise His Majesty accordingly. The plaintiff will pay the costs of these appeals.

T. L. Wilson & Co., Solicitors for the defendant.

The plaintiff did not appear.

J. M. P.

Appeal allowed and suit dismissed.

CHAMPAT SINGH AND OTHERS

versus

JANGAU SINGH AND ANOTHER.*

Execution—Redemption decree—Deposit in court pending appeal by mortgagee—Lapse of deposit to Government.

Where in execution of a redemption decree the mortgagor deposits in court an amount sufficient to satisfy the decree and the mortgagor is left into possession, although an appeal against the decree by the mortgagee is pending, *held* that the mortgagee ought to take the amount deposited out of court without prejudice to his pending appeal either by arrangement or with the sanction of the court which would be given as a matter of course, and that if he fails to do so and the amount lapses to the Government, the mortgagee must bear the loss.

APPEAL from an order of the court of the Judicial Commissioner of Oudh, affirming an order of the District Judge of Sitapur, whereby a previous order of the Subordinate Judge of Sitapur was upheld.

The said order was made on the appellants' application for execution of a decree passed by the Privy Council in their favour in a redemption suit brought by them, as mortgagors, against the respondents, as mortgagees: For a report of the case see

Lekha Singh v. Champat Singh, I. L. R., 28 All., 724.

The Indian courts refused the application, and the appellants thereupon appealed to His Majesty in Council. The sole question for determination was whether the courts below were right in refusing the said application.

The facts of the case are sufficiently stated in their Lordships' judgment.

De Gruyther, K. C., and *Dube*, for the appellants.

K. Brown, for the respondents.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN :—This was an appeal from an order of the Judicial Commissioners dismissing an application by

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LORD
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the appellants, as mortgagors, for the execution of a redemption decree. The mortgage in respect of which the decree was made was a usufructuary mortgage for a period which has expired, but there was a provision for payment on redemption of a sum in respect of interest. The mode of calculating interest was a matter in controversy in the redemption proceedings in regard to which this Board differed from the view of the Judicial Commissioners.

By the judgment of this Board, dated the 28th of July, 1906, the respondents, the mortgagees, were held entitled to simple interest at the rate of 24 per cent. per annum on Rs. 3,519, the original mortgage debt as from the 14th of January, 1867, the date of the mortgage, as well as to mesne profits until redemption.

In 1902, previously to the judgment of this Board of the 28th of July, 1906, the mortgagors had deposited in court Rs. 3,844, a portion of which they afterwards withdrew, leaving in court Rs. 3,335, a sum sufficient to satisfy the interest payable in respect of the mortgage according to the judgment of the Subordinate Judge of Sitapur, affirmed in substance by the Judicial Commissioners in April, 1902, and on the 5th of December, 1902, the mortgagors were let into possession of the mortgaged premises, although an appeal to His Majesty against the order of the Judicial Commissioners was then pending.

After the judgment of this Board possession of the mortgaged premises was restored to the mortgagees on the 12th of November, 1906.

On the 15th of December, 1906, the mortgagors deposited in court Rs. 40,000 and again applied for possession of the mortgaged premises.

The sum of Rs. 40,000 *plus* the sum of Rs. 3,335, making together the sum of Rs. 43,335, was more than sufficient to discharge the interest due in respect of the mortgage in accordance with the judgment of this Board of the 28th of July, 1906, amounting on the 15th of December, 1906, to Rs. 37,239-2-11, together with the amount due to the mortgagees for costs which amounted to Rs. 3,765, making together the sum of Rs. 41,004-2-11.

On the opening of the present appeal it became obvious that the refusal of the Judicial Commissioners to restore the mortgagors to possession was due to a misconception of the effect of their Lordship's judgment of the 28th of July, 1906, or to a slip in the order founded on that judgment. The error, if there was a slip in the order, is attributable to the mortgagees, as their appeal was heard *ex parte*. Their Lordships therefore intimated that they would humbly advise His Majesty that the present appeal should be allowed, and minutes were to be settled by the counsel for the parties. The learned counsel, however, were unable to agree, and the matter has been referred to their Lordships.

It is stated that the sum of Rs. 3,335 has now lapsed to the Government under the Rules.

It appears that after having been restored to possession the mortgagees obtained a decree against the mortgagors for the sum of Rs. 9,800, which was the agreed amount of the mesne profits received by the mortgagors during the period of their possession.

On behalf of the mortgagors Mr. DEGRUYTHER offered to set this amount, Rs. 9,800, against the amount of mesne profits received by the mortgagees since the deposit in court of the sum of Rs. 40,000 by the mortgagors. Their Lordships think that this is a fair and reasonable proposal and that effect ought to be given to it.

Their Lordships also think that if the sum of Rs. 3,335 has lapsed to the Government, and is not forthcoming, the mortgagees must give credit for that amount as they ought to have taken it out of court without prejudice to their pending appeal either by arrangement or with the sanction of the court in India or the sanction of this Board, which no doubt would have been given as a matter of course.

Their Lordships think that the proper order, therefore, will be that the mortgagors should be restored to possession forthwith, and that the mesne profits received by the mortgagees since the 15th December, 1906, should be set off against the decree for Rs. 9,800 and taken in satisfaction of that decree and interest, and (the mortgagees being entitled to

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draw out of court Rs. 41,004-2-11, the amount due to them for interest and costs calculated up to the 15th of December, 1906), the balance of the amount in court increased by the addition of the sum of Rs. 3,335, if that sum has lapsed to the Government, should be paid out to the mortgagors.

Their Lordships will humbly advise His Majesty accordingly.

Their Lordships will make no order as to costs.

* *Barrow, Rogers and Nevill*, Solicitors for the appellants.

T. L. Wilson and Co., Solicitors for the respondents.

J. M. P.

Appeal allowed.

GANGA SINGH AND ANOTHER

versus

KING-EMPEROR.*

Criminal Procedure Code (Act V of 1908), sections 110, 117, para. 2 and section 540.

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RAFIQ, J.

In a case under section 110 of the Criminal Procedure Code where the evidence for the defence is equally good with that for the prosecution, the accused are entitled to an acquittal.

Under para. 2 of section 117 of the Code of Criminal Procedure, a case under section 110 of the Code of Criminal Procedure is to be conducted as if it were a warrant case and the procedure to be observed in the trial of warrant cases is laid down in sections 251 to 256 of the Code of Criminal Procedure. According to the said sections, an accused cannot be called upon to enter on his defence until the prosecution closes its case. No further evidence can be admitted against the accused except under section 540 for which there must be valid reasons which must be recorded.

CRIMINAL REVISION from an order of H. R. Nevill, Esq., District Magistrate of Etawah.

The facts of the case appear sufficiently from the judgment of the court.

C. Dillon and *G. W. Dillon*, for the applicants.

R. Malcomson (Assistant Government Advocate), for the Crown.

The following judgment was delivered by

RAFIQ, J.—This is an application in revision. The applicants seek to set aside the order of the District Magistrate of Etawah, confirming that of the Sub-Divisional Magistrate, directing the two applicants to furnish personal bonds of Rs. 500 each and two sureties each of the like amount to be of good behaviour for one year or in default to undergo one year's rigorous imprisonment. The learned counsel for the applicants has argued the case at some length. In order to appreciate his contention some facts should first be recited. The two applicants, Sirdar Singh and Ganga Singh *alias* Lalloo Singh, are brothers. They are landholders

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* Cr. Rev. No. 630 of 1912.

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and carry on a paying business at Auraiya. They live in Rahatpur.

The Sub-Inspector of Auraiya who has been there since September, 1911, laid information against the applicants to the effect that they protected and harboured thieves, associated with notorious bad characters and received stolen property. On the basis of that information a notice under section 112, Criminal Procedure Code, was drawn up against the applicants. They repelled the charges brought against them. The hearing of the case was fixed for 23rd March, 1912. On 22nd March, 1912, the police filed a petition to the effect that the prosecution witnesses had been won over by the defence, and some others will be produced later. The case was taken up on 26th March, 1912, when their witnesses were examined by the police and the case was presumably closed for the prosecution. The applicants were called upon to enter on their defence. They denied the charges contained in the police information and examined twenty witnesses in support of their character and reputation in the neighbourhood. After the close of the evidence for the defence, some more witnesses were examined by the Sub-Divisional Magistrate for the prosecution. The Sub-Divisional Magistrate accepted the evidence for the police and his order was upheld by the District Magistrate. Now it is contended on behalf of the applicants that the procedure of the Sub-Divisional Magistrate as to the recording of evidence was distinctly erroneous and injurious to the defence. Under para. 2 of section 117 of the Code of Criminal Procedure, the case against the applicants was to be conducted as if it were a warrant case and the procedure to be observed in the trial of warrant cases is laid down in sections 251 to 256, Criminal Procedure Code. According to the said sections, an accused cannot be called upon to enter on his defence until the prosecution closes its case. No further evidence can be admitted against the accused except under section 540 for which there must be valid reasons and which reasons must be recorded. In the present case, the witnesses for the prosecution examined after the close of the defence evidence were not examined under section 540, Criminal Procedure Code, and no order appears on the record to show why was

additional evidence for the prosecution allowed after the close of the defence. Such a procedure has obviously placed the applicants at a disadvantage. Further, it is argued that the evidence for the police relates to general rumour, or suspicion, or the statements or conduct of third persons who justified their conduct by reference to the applicants. The police witnesses with the exception of two men come from distant places, and not from the village where the applicants reside or the village where they carry on their business.

For the applicants, exception is also taken to the reasons given by the learned District Magistrate for upholding the order of the Sub-Divisional Magistrate. It is said that no reflections were cast on the Sub-Inspector or the Sub-Divisional Magistrate, when it was urged for the applicants, that, unfortunately for the latter, their enemies had put into circulation reports which found credence with the said officers.

It is true that it is difficult to get evidence against well-to-do men and the police would think twice before laying a charge against such persons, but the latter have more enemies than a poor man—and have a right to the consideration of evidence against them on the same principles as would be applied in the consideration of evidence against a poor man. It is also urged that the absence of any report by former police officers cannot be ignored on the assumption that they were lazy and did not discharge their duties with diligence. The last argument advanced is that the evidence for the defence is just as good as, if not better than, the evidence for the police. I think that the procedure adopted by the Sub-Divisional Magistrate in admitting the evidence for the prosecution after the close of the defence was erroneous and unauthorized. It was also prejudicial to the applicants. But apart from the defects in the procedure or the criticism of the reasons of the lower courts, I think that the information laid by the police has not been established. That evidence is open to several objections. Only two men, *viz.*, Lalloo and Kanhaiya, come from Auraiya, and the others come from villages from two to ten miles off the village of the applicants. Lalloo admittedly is an enemy of the applicants. He has given evidence against them before. Kanhaiya was once

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convicted of gambling and would like to keep friends with the police. Another witness, Kalka, has been bound over at the instance of the police and would no doubt be willing to please them by giving evidence. Many witnesses depose to cases in which the applicants were suspected to have received a share of the stolen property. Such evidence is inadmissible as was held by my learned colleague, Mr. Justice CHAMIER, in the case of Mulu from Etawah also, *vide* revision case No. 344 of 1911.

One witness deposes to having paid money to Lashkaria and another who levied the black-mail on him repeating that they had been sent by the applicants. Lalman, who makes that statement, admits that he made no report at the time and gives no reason for the omission. Lashkaria and his comrade have not been examined. It is easy to make such statements as Lalman has made and difficult to refute them. It is also doubtful whether such evidence is admissible.

The other witnesses state that there is شهرت عام that the applicants are bad characters. The learned counsel for the applicants contends that the words شهرت عام mean general rumour and not general repute. I do not think so. I think that the words mean general repute also. The witness, further, say that the applicants associate with Lashkaria and a few other who are notorious *badmashes*. This evidence of association when examined clearly amounts to this that once or twice the applicants had been seen in the company of Lashkaria and others. The applicants, it is said, are men of business. They receive all sorts of men. Besides they might have allowed the notorious men in question to talk or walk with them for fear.

The objection that thieves and bad characters are settled by the applicants on their land is not borne out by any reliable evidence. Some of the witnesses say that they have heard so.

The only evidence, then, against the applicants, is of some witnesses who do not live in the villages where the applicants live or carry on business or in the immediate neighbourhood of the said villages, who say that the applicants by general repute are known to be bad characters. But even if the

whole of the evidence for the police were to be taken as admissible, it is, I think, sufficiently rebutted by the evidence for the defence. There is a larger volume of evidence for the applicants and that evidence is of men of the villages where the applicants reside and carry on their business or of the immediate neighbourhood. No valid reasons have been given by the lower courts or by the Assistant Government Advocate for disbelieving the evidence for the defence.

I think that it is just as good as, if not better than, that for the prosecution.

And in a case under section 110, Criminal Procedure Code, where the evidence for the defence is equally good with that for the prosecution, the accused are entitled to an acquittal, *vide* 1 A. L. J. R., 611. I, therefore, accept this application and set aside the order of the lower courts, calling upon the applicants to furnish personal bonds and sureties to be of good behaviour for one year.

Application allowed.

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CHIMMAN LAL AND ANOTHER,

versus

SIKANDAR KHAN.*

Civil Procedure Code (Act V of 1908), Order 1, Rule 3—Grounds for adding parties.

By a compromise between S. K. and L. the latter was to get $\frac{1}{4}$ th of some property as her share of inheritance and she was to remain in possession of $\frac{1}{4}$ th in lieu of dower. L. made a gift of the property to I, who mortgaged it to C. L. After the death of L., S. K. claimed $\frac{1}{4}$ th of the property as against I. After the institution of the suit, I. sold the property to C. L. in lieu of the mortgage. C. L. applied to be made a party to the suit as defendant. *Held*, that as no relief was sought against the applicant and the case against the applicant was not the same as against the defendants already on the record, his application was rightly rejected.

CIVIL REVISION from an order of Sayed Jawwad Husain, Subordinate Judge of Saharanpur.

* Civ. Rev. No 43 of 1912.

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The facts of the case appear from the judgment of the court.

Durga Charan Banerjee, for the applicants.

Nehal Chand, for the opposite party.

The judgment of the Court was delivered by

RAFIQ, J.—This is an application in revision from an order of the Subordinate Judge of Saharanpur, rejecting an application of the applicants, by which they had asked the lower court to be brought on the record as defendants in the suit brought by Sikandar Khan against Imam-ud-din and others. It appears that one, Rao Ghulam Husain Khan, was the proprietor of the property which is the subject-matter of the suit of Sikandar Khan. After Ghulam Husain Khan's death, his son, Khadim Husain Khan, entered into possession of the property. After the death of Khadim Husain, there was a dispute as to the succession to the property, between Musammat Latif-un-nisa, widow of Ghulam Husain Khan and Haji Hemu Khan, who described himself as the nephew of Ghulam Husain. Sikandar Khan stated in that suit that he was the son of Ghulam Husain Khan by his second wife. It was decided by this Court that Sikandar Khan was the legitimate son of Ghulam Husain. Subsequently, there was a dispute between Sikandar Khan and Musammat Latif-un-nisa, and the dispute was compromised in this way that she was to remain in possession of $\frac{1}{8}$ th of the property as her legal share and of the balance in lieu of dower. Musammat Latif-un-nisa executed a deed of gift on the 11th of January, 1899, in favour of Imam-ud-din, son of Rahim Bakhsh, in respect of 555 bighas, 16 biswas, situate in mauza Sakraura. Imam-ud-din, in turn, executed a deed of mortgage in favour of the applicants in respect of the property gifted to him. The mortgage was renewed on the 31st of March, 1911. Musammat Latif-un-nisa died in April, 1908. After her death, Imam-ud-din and some others entered into possession of the property left by her. Sikandar Khan instituted a suit in the court of the Subordinate Judge of Saharanpur on the 28th of April, 1911, against Imam-ud-din and others, who were in possession of Ghulam Husain's property after Latif-un-nisa's death, on the allegation that he was

entitled to get possession of $\frac{7}{8}$ th of the property as the legitimate son of Ghulam Husain Khan. After the institution of Sikandar Khan's case, Imam-ud-din executed a deed of sale on the 28th of June, 1911, in respect of the property which he had mortgaged to the applicants in favour of the latter. The applicants, on the basis of their sale-deed, made an application to the Subordinate Judge of Saharanpur under Order 1, Rule 8, to be brought on the record. The lower court on the objection of the plaintiff rejected the application. In revision before us it is argued that though the applicants may have no ground to be made defendants on the basis of the sale-deed in their favour, yet as the sale deed was obtained in lieu of the consideration of the mortgage deed which was executed prior to the institution of the suit, the applicants should be brought on the record as defendants in the case. We are unable to agree with the learned advocate for the applicants. The rule as to array of parties is given in Order 1, Rule 3. It is to the effect that all persons may be joined as defendants against whom any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative. In the present case no relief is sought by Sikandar Khan against the applicants, nor is the case of Sikandar Khan the same against the applicants as against the defendants already on the record. We, therefore, think that the order of the learned Subordinate Judge was correct. The application fails and is dismissed with costs.

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Rule discharged.

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BANERJI, J.

NAWAL KUNWAR

versus

BAKHTAWAR SINGH AND OTHERS.*

*Evidence Act (I of 1872)—Sections 18, 21—Admissibility in—Statements
in a mortgage deed—Representatives of mortgagor.*

"The recital in a deed is admissible as against the executant and as against persons who derive their interest in the subject-matter of the suit from the executant. Sections 18 and 21 of the Evidence Act make the recital admissible in evidence against them also as admissions. The probative value of that admission is a different question."

FIRST APPEAL from a decree of A. Rahman, Esq., Subordinate Judge of Saharanpur.

Plaintiffs appeal.

Motilal Nehru and *Harendra Krishna Mukerji*, for the appellant.

Sunder Lal and *Gokul Prasad*, for the respondents.

The judgment of the Court was delivered by

Banerji, J.

BANERJI, J.—This appeal arises in a suit brought by the appellant for sale upon a mortgage, dated the 10th January, 1889, executed by the first defendant, Bakhtawar Singh, and his father, Partap Singh, for self and as guardian of his son, Risal Singh, the defendant No. 2, who was at that time a minor. The amount secured by the mortgage is Rs. 10,000, but the plaintiff alleges that she has paid only Rs. 8337 9-0, which she seeks to recover with interest by sale of the mortgaged property. There was a prior mortgage in respect of the same property in favour of Munna Lal, the father of the third and fourth defendants. The plaintiff alleges that this mortgage has been discharged by her. Those defendants have purchased the mortgaged property from the first two defendants under a sale deed, dated the 18th of July, 1896, and have therefore been made parties to the suit. The fifth defendant, Banarsi Das, is the grandson of one Shibban Lal, who also held a prior mortgage in respect of the property mortgaged to the plaintiff. The plaintiff alleges that she paid

* F. A. No. 65 of 1900.

a part of the mortgage money due to Shibhan Lal and seeks to redeem that mortgage by payment of the balance. The sixth defendant, Dalip Singh, is the purchaser of a portion of the mortgaged property from the defendants Nos. 3 and 4. The defendants Nos. 1 and 2 urge in answer to the claim that Rs. 1,000, only out of the consideration for the plaintiff's bond was paid and that the said amount has been realized by the plaintiff from the usufruct of the mortgaged property. The defendants Nos. 3 and 4, the only defendants who have seriously contested the claim, plead that the plaintiff's mortgage is fictitious and nominal and that it was executed in her favour by Partap Singh with a view to protect his property. This contention of the defendants has been accepted by the lower court which has dismissed the plaintiff's claim. The plaintiff has preferred this appeal.

The principal question to be determined in the appeal is whether the mortgage in favour of the plaintiffs was a fictitious transaction.

After considering the evidence their Lordships proceeded as follows :—

For the above reasons we are of opinion that the conclusion at which the learned Subordinate Judge arrived as to the nature of the transaction is not warranted by the evidence, and that the mortgage in the plaintiff's favour was a genuine mortgage.

We have now to consider what payments have been actually made by the plaintiff. It was stated in the mortgage-deed that out of the amount of the consideration for the mortgage the plaintiff was to withhold Rs. 8,293 for payment to prior creditors. Out of this sum, Rs. 3,250 was, as we have already stated, due to Munna Lal and was set off against the amount of the sub-mortgage executed by the plaintiff in his favour, so that this sum of Rs. 3,250 has been paid by the plaintiff. It has also been proved that she paid to Bhawani Prasad on account of Shibhan Lal's mortgage Rs. 1,500 on the 11th January, 1889, and Rs. 1,365-9-0 on the 13th March, 1889, in all Rs. 2,865-9-0. It has also been proved by the evidence of Kishan Sahai that he was paid Rs. 500 in discharge of a promissory note held by him. The payment of

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Rs. 15 out of the sum of Rs. 515, mentioned in the plaint as paid to Kishan Sahai, has not been established. It is recited in the mortgage-deed that the plaintiff took credit for a sum of Rs. 549 due to him on account of a note of hand, dated the 14th March, 1888. It was contended before us that no evidence existed on the record as to Partap Singh having executed any promissory note in favour of the plaintiff for which Rs. 549 was due by him. The learned Advocate for the respondents contended that the recital contained in the mortgage-deed in regard to that promissory note was not admissible in evidence against the respondents, defendants Nos. 3 and 4, purchasers from the mortgagors. We are unable to agree with this contention. There can be no question that the recital is admissible in evidence as against the mortgagors themselves, and as the defendants Nos. 3 and 4 derive their interest in the subject matter of the suit from the mortgagors. Sections 18 and 21 of the Evidence Act make the recital admissible in evidence against them also as admissions. What the probative value of that admission may be is a different question, but we are clearly of opinion that the statement may be used as evidence against defendants Nos. 3 and 4.

After considering the evidence their Lordships proceeded as follows :—

For the above reasons we have come to the conclusion that the plaintiff has advanced under her mortgage deed a sum of Rs. 8,322-9-0.

RADHA RAWAN

versus

TULA RAM.*

CIVIL.

1912.

October, 31.

KNOX, J.
RAFIQ, J.

Practice—Application for leave to withdraw suit with liberty to bring a fresh suit on conclusion of arguments—Not entertainable.

Where there was nothing in the judgment of a lower court granting leave to withdraw a suit with liberty to institute a fresh suit, to show that that court was satisfied that the suit must fail by reason of a formal defect and where there was no other sufficient cause for permitting the suit to be withdrawn, the High Court set aside the order and sent the case back for hearing.

CIVIL REVISION from an order of Babu Bansgopal, First Additional Subordinate Judge of Agra.

An application was made for withdrawal of the suit with liberty to bring another suit on the conclusion of arguments and was granted.

The application was as follows :—

On account of some defects of law and procedure, as well as for other reasons there seems to be no hope of success in the above case. Therefore the petitioner makes this application under Rule 1 Order 23, Act V of 1908, and prays that the plaintiff-applicant may be permitted to bring a suit afresh and to withdraw this suit with permission to institute a fresh suit.

The Subordinate Judge passed the following order :—

I have heard the parties. I think there are sufficient reasons to allow the plaintiff to bring his suit with liberty to bring his suit again. The application is granted. Plaintiff's claim is dismissed with costs with liberty to bring another suit. Defendant will get his half cost from the plaintiff.

The defendant applied for revision of the order on the following ground :—

Because the evidence of the parties and the arguments having been concluded and the application for withdrawal

* Civ. Rev. No. 63 of 1912.

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of the suit not having set forth any formal defect in the suit, the learned Additional Subordinate Judge has acted with illegality and material irregularity in allowing the suit to be withdrawn granting the plaintiff the liberty to file a fresh suit and the defendant-petitioner has been materially prejudiced thereby.

Motilal Nehru and *Tej Bahadur Sapru*, for the applicant.

W. Wallach and *Satish Chandra Banerji*, for the opposite party.

The judgment of the Court was delivered by

Knox, J.

KNOX, J.—There is nothing in the judgment of the court below to show that that court was satisfied that the suit must fail by reason of some formal defect. It was not shown to us that there was any formal defect or that there was any other sufficient cause. We have, therefore, no alternative but to set aside the order of the court below and order that the case be returned to that court with directions that it be restored to the file of pending suits and disposed of according to law. The costs of this application will be borne by the respondent.

Order set aside.

MOHAN LAL

versus

JUMERAT.*

CIVIL.

1912.

November, 2.

RAFIQ

Limitation Act (IX of 1908), Articles 7 and 102—Wet-nurse—Suit by domestic servant.

Held that a wet-nurse was not a household servant and a suit by her for recovery of her wages, was governed by Article 102 of the First Schedule of Indian Limitation Act.

CIVIL REVISION from an order of Captain R. F. S. Beyts, Judge, Small Cause Court, of Jhansi.

Defendant's application.

Sital Prasad Ghosh, for the applicant.

Durga Charan Banerjee, for the opposite party.

The following judgment was delivered by

RAFIQ, J.—This is an application in revision under section 25 of the Small Cause Court Act. The facts which have led to the making of the present application are as follows :—Musammat Jumerat, the opposite party, was employed by the applicant in December, 1907, to suckle and nurse his infant girl. Musammat Jumerat served the applicant up to January, 1910. In November, 1910, she instituted a suit in the Court of Small Causes at Jhansi, to recover Rs. 150 on the allegation that she had been employed by the applicant at Rs. 10 a month to suckle and nurse his child and served him for 26 months, for which she had not been paid anything. She gave up her claim for Rs. 110 and claimed only Rs. 150. The defendant-applicant denied having employed Musammat Jumerat as a wet-nurse at Rs. 10 per month. He further pleaded that the claim was barred by limitation. The learned Judge disallowed the pleas in defence and decreed the claim for Rs. 150. It is urged on behalf of the applicant in this Court that the case falls under Article 7, Schedule I, of the Limitation Act, 1908, as Musammat Jumerat was a house-hold servant. Her wages became due

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* Civ. Rev. No. 59 of 1912.

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at the end of every month, and her cause of action accrued on the default in payment of her wages at the end of the month and hence the claim is clearly barred except for three months. For the opposite party the contention is that Musammat Jumerat is not a household servant and that her case is covered by Article 115 of the First Schedule of Act No. IX of 1908. No authority has been cited on either side to show whether a wet-nurse does or does not fall within the definition of a household servant. I do not think that a wet-nurse can properly come under the definition of household servant. The case of Musammat Jumerat does not in my opinion fall under Article 7 of the First Schedule of the Limitation Act. I think her case is covered by Article 102 of that schedule and her claim is therefore within time. The application is, therefore, dismissed with costs.

Application dismissed.

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1912.

November, 4.

GRIFFIN, J.

HAR NARAIN

versus

UMRAI.*

Civil Procedure Code (Act V of 1908), Order 47, Rule 7—Grounds for allowing an appeal—Order granting a review—Dismissal of a previous application for restoration.

A suit was dismissed for default and an application for its restoration was rejected. An application for review of judgment was granted, but on appeal the District Judge held that no review could be granted when an application for restoration had been rejected, *held*, that this was not one of the grounds upon which an appeal could be allowed under the provisions of Order 47, Rule 7, of the Code of Civil Procedure.

APPLICATION for revision of the judgment of H. Dupernex, Esq., District Judge of Farrukhabad, reversing the order of Babu Piari Lal, Munsif of Kanauj.

The facts were as follows :—A suit was dismissed for default of appearance. The plaintiff applied under Order 9,

* Civ. Rev. No. 90 of 1912.

Rule 9, for restoration. The application was disallowed; He then applied under Order 47, Rule 1, for review of judgment, and the court allowing it restored the suit. The defendant appealed from the order granting the review and restoring the suit, and the appellate court set it aside on the ground that there was not sufficient cause for granting the review, and that the plaintiff, having already made an application under Order 9, Rule 9, had exhausted his remedies, and that it was not open for him to take the further course of applying for review. The plaintiff applied to the High Court in revision.

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Gulsari Lal, for the applicant :— The Judge entertained the appeal without jurisdiction. An appeal from an order granting a review can lie only if the case comes within one of the three clauses of Order 47, Rule 7. An appeal will lie on no other ground. The question as to whether the ground on which the court granted the review was sufficient or otherwise cannot form the basis of an appeal.

Daryai Bibi and another v. Badri Prasad, [1895] I. L. R., 18 All., 44.

Ali Akbar and others v. Khurshed Ali, [1905] I. L. R., 27 All., 695.

The provisions of Order 47, Rule 7, are the same as those of old section 629, and the rulings, therefore, are in force. Moreover, there is no provision of law that where several remedies are open to a party and he avails himself of one, he should necessarily be debarred from the others. The ground, therefore, on which the Judge proceeded, is incorrect.

A. P. Dube, for the opposite party :—The application under Order 9, Rule 9, was dismissed. If there was no sufficient cause for granting that application, there could be no sufficient cause for granting the review. The plaintiff had exhausted his remedies—Order 43, Rule 1 (*w*) is an independent provision giving a right of appeal. The review was without sufficient cause and so comes under clause (*c*) of Order 47, rule 7.

Gulsari Lal, in reply :—Order 43, Rule 1 (*w*) is to be read subject to Order 47, Rule 7. "The sufficient cause" in clause (*c*) relates only to the clause for filing the application after period of limitation.

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Griffin, J.

The following judgment was delivered by

GRIFFIN, J.—A suit was dismissed under the provisions of Order 9, Rule 8, of the Code of Civil Procedure. An application under Order 9, Rule 9, to have the order of dismissal set aside was also dismissed. The plaintiff again applied under Order 47, Rule 1, for review of judgment. The court of first instance allowed that application and setting aside its former orders directed that the suit be restored to its original number. The defendant appealed and the learned District Judge has reversed the order of the court of first instance and directed that the application for review be dismissed. The plaintiff comes here in revision, and it is contended on his behalf that the court below had no jurisdiction to hear the appeal from the court of first instance except on the grounds set out in Order 47, Rule 7. That rule provides that an order rejecting an application for review of judgment shall not be appealable, but an order granting review shall be appealed against on grounds specified in clauses (a), (b), or (c) following. None of the reasons given by the court below for allowing the appeal comes under clauses (a), (b) and (c) of Rule 7. The provision of Rule 2 of Order 47 does not apply. Rule 4 is also not applicable under the circumstances. The court below gave as its reason for allowing the appeal that as the application for restoration had been dismissed, the plaintiff cannot come again and ask for a review of judgment. This is not one of the grounds upon which an appeal could be allowed under the provisions of Order 47, Rule 7. I allow this application, set aside the order of the court below and restore the order of the court of first instance. The costs of this application will be the costs in the case.

B. K. M.

Application allowed.

BIRJ LAL

versus

BUA RAM AND OTHERS.*

CIVIL

1912.

November, 4.

RAFIQ, J.

Civil Procedure Code (Act V of 1908), Order 19, Rule 41—Restoration of appeal dismissed for default without notice—Valid—Order 9—Suit dismissed for default—Restoration of.

When a suit is dismissed in the absence of both the plaintiff and the defendant, it can be restored on the application of the plaintiff without notice to the defendant.

Where at the hearing of an appeal neither party was present and it was dismissed but the order was set aside by the appellate court on a motion by the appellant without notice to the other side, *held* that the order of restoration was not erroneous.

CIVIL REVISION from an order of Khwaja Abdul Ali, Additional Subordinate Judge of Cawnpore.

Benode Behari, for the applicant.

Gobind Prasad, for the opposite parties.

The following judgment was delivered by

RAFIQ, J.—This is an application in revision under section 115 of the Code of Civil Procedure, against the order of the learned Additional Subordinate Judge of Cawnpore,^a restoring the appeal of the opposite party which had been struck off for default. It is contended on behalf of the applicant that the order of the lower court restoring the appeal is bad inasmuch as no notice was sent to or served upon the applicant, to show cause why the appeal of the opposite party should not be restored.

Rafiq, J.

It is further contended that the affidavit filed by the opposite party in the lower court explaining his absence on the day of hearing of the appeal is insufficient and does not excuse his absence. The order of the lower court was passed under Rule 19, Order 41, of the Code of Civil Procedure. That Rule does not require any notice to be issued to the respondents prior to making an order of restoration of an appeal,

^aCiv. Rev. No. 150 of 1911.

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Rafiq, J.

struck off for default. But it is said for the applicant that under section 107, clause 2, the provisions of the Code of Civil Procedure applicable to courts of first instance are also applicable to the appellate courts, and under the rules applicable to the courts of first instance no suit dismissed for default can be restored without notice to the defendant. The rules on the subject of dismissal and restoration of suits are given in Order 9 of the Code. If a suit is dismissed in the absence of both the plaintiff and the defendant, the suit can be restored on the application of the plaintiff without issuing any notice to the defendant. But in cases where the plaintiff is absent and the defendant is present, the law requires that notice should be given to the defendant before restoring the suit. Even if the contention of the applicants, that under section 107, clause 2, the rules under Order 9, applicable to the courts of first instance are also applicable to the appellate courts, be conceded, it does not show that the order of the lower court is erroneous. For it appears from the record that neither party was present on the day of hearing of the appeal, when the order of dismissal of the appeal was passed. In a suit dismissed under similar circumstances no notice would be required to be issued to the defendant before passing an order of restoration of the case. The second contention that the affidavit of the opposite party does not disclose sufficient reason for his absence on the day of hearing of the appeal is not made out. If the allegations made in the affidavit are correct and there is no reason to believe otherwise, the opposite party was unavoidably absent on the day of hearing of the appeal. The application fails and is dismissed with costs.

Application dismissed.

RAM JAR SINGH

versus

BHAGALU SINGH AND OTHERS.*

**Evidence—Execution of a second mortgage deed in lieu of first—Suit on subsequent deed—Circumstances under which former deed executed—Proof of—Oral evidence.*

In a suit for sale on a mortgage alleged to have been executed in lieu of a prior mortgage, the earlier mortgage deed was not produced but oral evidence was given to prove the circumstances in which the documents were executed, *held* that such evidence was admissible.

SECOND APPEAL from a decree of a G. A. Paterson, Esq., District Judge of Benares, reversing a decree of Babu Murari Lal, Munsif.

D. R. Sawhney, for the appellant.

Tej Bahadur Sapru, for the respondents.

The following judgment was delivered by

CHAMIER, J.—In my opinion the decision of the Munsif in this case was correct and should not have been disturbed. The suit is based upon a mortgage-deed executed by Mahadeo Singh, father of the defendants-respondents, in favour of the plaintiff-appellant. The consideration for the mortgage is stated in the deed to be a sum of Rs. 115 due on a previous mortgage executed by Mahadeo Singh and his cousins, Bahadur Singh and Sahdeo Singh. According to the decision in *Chandradeo's* case, the appellant had to prove that the mortgage in suit was made either for family necessity or to secure payment of an antecedent debt. The appellant produced Bahadur Singh (already mentioned) who said that the deed of August the 9th, 1892, was executed on the occasion of a partition between two branches of the family and that the deed in suit was executed on the occasion of a later partition between the members of one of those branches of the family. He says that he and his brother, Sahadeo Singh, were liable to Ram Jar Singh under the deed of 1892, and that on the occasion of the later partition, Mahadeo

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Singh undertook to pay the amount due to Ram Jar Singh. The Munsif believed the evidence of Bahadur Singh and it is perfectly clear that if that evidence is true and is admissible, the deed in suit was executed in respect of an antecedent debt. On appeal the District Judge did not say that he disbelieved the evidence of Bahadur Singh, but he said that the whole of it was inadmissible on account of the non-production of the deed of August 9th, 1892, and of the deed by which the later partition was effected. It appears to me that Bahadur Singh did not give the contents of documents. He merely stated the circumstances in which documents were executed. It may possibly be wrong to admit his statement that the execution of the earlier or the later mortgage-deed was one of the terms of the partition. But I can see no reason why he should not prove that the deed in suit was executed on a certain occasion and in consideration of a sum for which Mahadeo Singh and two others were already liable. The learned Judge says that the recitals in the mortgage in suit are not evidence against the defendants. It may be that they are not evidence of the truth of the facts stated in them. But they are surely admissible to rebut the suggestion that Bahadur Singh's evidence has been fabricated for the purpose of this suit. The District Judge does not say that he disbelieves the evidence of Bahadur Singh. The Munsif said that he believed it. I might remand the case to the District Judge for a fresh finding. But it is open to me under the present Code to decide the question myself. I have no hesitation in accepting the evidence of Bahadur Singh, and I find that the mortgage in suit was executed in consideration of an antecedent debt. I allow the appeal, set aside the decree of the lower appellate court and restore that of the court of first instance with costs in all courts.

Appeal allowed.

HIRDEY NARAIN AND ANOTHER

versus

M. J. POWELL AND ANOTHER.*

Land Acquisition Act—Compensation—Mode of apportioning between different interests

CIVIL

1912.

October, 30.

GRIFFIN, J.
CHAMIER, J.

Where there are different interests in a land which has been acquired under the Land Acquisition Act, the proper method of apportioning the compensation is to calculate the respective values of the interests and to award the compensation in proportion thereto

FIRST APPEAL from a decree of E. O. E. Leggatt, Esq., District Judge of Saharanpur.

Tej Bahadur Sapru, for the appellants.

A. E. Ryves and *Nehal Chand*, for the respondents.

The material facts appear from the following order of remand.

KARAMAT HUSAIN and CHAMIER, JJ.—This is an appeal against an order or decree of the District Judge of Saharanpur, awarding to the appellants $\frac{1}{8}$ and to the respondent Mrs. Powell $\frac{7}{8}$ of the sum of Rs. 7,768-8-0, awarded by the Superintendent of Dehra Dun as compensation for certain land taken up under the Land Acquisition Act for public purposes. It is not now disputed that Rs. 7,768-8-0 represent the fair value of the property taken up, and the only question for decision now is how this sum should be divided between the appellants and the respondent Mrs. Powell. The Superintendent proposed to award to the appellants the whole of the above sum except Rs. 144 which he considered to be the value of Mrs. Powell's interests in the land. She objected to this, and the Superintendent referred the matter to the District Judge. Mrs. Powell's case was that she was virtually the zamindar of the land and that the appellants were only nominally zamindars and were entitled at best to compensation calculated on the amount of rent paid to them. That rent was Rs. 12 per annum, and her suggestion was that the zamindars should be awarded Rs. 144

* F. A. No. 351 of 1910.

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only. The reference by the Superintendent was made to the District Judge early in 1910. A date was fixed for the hearing of the case in June, 1910, and it was decided that the case should be taken up at Dehra Dun. On same day in June, the exact date is not clear, it seems to have occurred to some one that the appellants were interested in the case, as of course they were, and on June, the 13th, notice was issued to the appellant, Hirdey Narain, that the case would be taken up on the following day. Notice was served upon Hirdey Narain on the 13th of June, at 9 P. M. He appeared before the court on the following day, and, as the Judge observes, very reasonably asked for time. On that day two witnesses only were examined for Mrs. Powell and the case was adjourned to June 22nd. It was taken up on June 25th. Witnesses were examined on that day and on the 26th, one witness only being produced by Hirdey Narain. Here we may mention that although Maharaj Narain seems to have a share in the property, no notice was issued to him. But this is not made a ground of complaint here, and for present purposes Maharaj Narain may be disregarded. The object of Mrs. Powell seems to have been to prove that occupancy tenants, like herself, were entitled to build upon their land and also to transfer it to whomsoever they pleased. An extract from the *wajib-ul-ars* of the village was put in, and several witnesses were called and questioned as to the rights of occupancy tenants in the village in question and in the adjoining villages. It is unnecessary for us to examine this evidence in detail. The *wajib-ul-ars* does not lay down that occupancy tenants can transfer their rights. It says only that certain *Kashikars* can build houses without the permission of the landlord. The oral evidence on the point is quite worthless. The District Judge has arrived at the conclusion, as we understand his judgment, that occupancy tenants in the suburbs of the town of Dehra Dun which include the village in question are practically sub proprietors who are entitled to transfer their rights and need only pay a quit rent to the zamindars. In arriving at this conclusion he made use of some remarks made by Mr. Dampier in a Rent Rate report for the Dehra suburban circle. It is not contended here that these remarks are admissible in evidence.

They ought to have been excluded and even if they are admitted, we consider that they are not sufficient to show that Mrs. Powell is entitled to transfer her rights in the land. She is recorded, or rather the person through whom she claims, is recorded, as occupancy tenant of the land. According to the present law she is not entitled to transfer her rights. No issues were fixed in the case. The point which the District Judge had to decide was how the sum awarded by the Collector as compensation for the land was to be divided between the claimants, and a definite issue should have been struck on this question. The sum awarded by the Collector should be apportioned between the appellants and Mrs. Powell in proportion to their interests in the land. On the one hand we have the zamindars entitled to receive Rs. 12 per annum as rent ; on the other hand we have Mrs. Powell an occupancy tenant of the land, receiving according to the evidence Rs. 40 from her sub-tenants, so that at first sight it would appear that the respective values of the interest of the zamindars and Mrs. Powell are in the proportion of 12 to 28, and it is in this proportion that the sum awarded by the Collector has been divided between them by the District Judge. The appellants take objection to this on the ground that the learned Judge has not taken into consideration the fact that whereas the rents received by Mrs. Powell were fixed quite recently, the rent payable by Mrs. Powell to the appellants was fixed as long ago as 1890. They point out that a land holder may sue an occupancy tenant for enhancement of the rent on the ground stated in section 43 of the Tenancy Act, and they contend that inquiry should be made as to whether Mrs. Powell was not at the date of the acquisition of the land paying rent at a rate below the prevailing rate paid by occupancy tenants for lands of similar quality and with similar advantages, and also that there has been a rise in the average local prices of staple food crops during the currency of the present rent. Owing to the fact that no issue was struck in this case the necessity for making a proper inquiry into the respective values of the interests of the parties has been overlooked. It has been held in more than one case in the Calcutta High Court that where a sum is to be apportioned between a landholder

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and a subordinate tenure-holder, the respective values of the interests of the two should be ascertained, and, if possible, something should be awarded to the landholder on account of the possibility that he may be able to have the rent of the subordinate tenure-holder enhanced. *Mutatis mutandis* what was said in those cases applies to the present case. If it can be shown that the landholder was at the time of the acquisition of the land entitled to have the rent enhanced, there would be no difficulty in ascertaining to what extent the rent might have been enhanced had the land not been acquired by the Government. There is some evidence that the landholder took steps to have the rent enhanced but abandoned them. Considering that notice of the case was given at the last moment to the appellant, and considering that no attempt has been made to ascertain the respective values of the interests of the parties in the land, we think that a further enquiry should be held. Under Order 41, Rule 25, we remit to the court of the District Judge the following issue :—What are the respective values of the interests of the appellants and Mrs. Powell in the land in question? Further evidence may be admitted on both sides. On return of the finding ten days will be allowed for filing objections.

On receipt of the finding the judgment of the Court was delivered by

Chamier, J.

CHAMIER, J.—This case was remitted to the District Judge in order that he might ascertain the respective values of the interests of the appellants and Mrs. Powell in the land in question for which the Superintendent of Dehra Dun has awarded under the Land Acquisition Act a sum of Rs. 7,768-8-0. The learned Judge rightly, as we think, set himself to ascertain what were the respective rights of the appellants and Mrs. Powell in the land. He came to the conclusion that Mrs. Powell was what he calls an *abadî* tenant, having a right to build on the land and to transfer it, that the interest of the appellant in the land was worth no more than Rs. 1,060; and that the balance of the sum awarded by the Superintendent of Dehra Dun, namely, Rs. 6,708-8-0, should be given to Mrs. Powell. But in case this court did not agree with the view that Mrs. Powell was an *abadî*

tenant, he went on to ascertain the values of the respective rights of the parties in the case on the assumption that Mrs. Powell was an occupancy tenant of the land. He found that the annual value of Mrs. Powell's interest as an occupancy tenant was Rs. 22, and the annual value of the appellant's interests as landlords was Rs. 11. He then suggested that Mrs. Powell should be given a sum of Rs. 352, that is, sixteen years' purchase of the annual value of her interests and that the balance should be given to the appellants. We are unable to accept either of these conclusions in their entirety. Mrs. Powell or rather the person through whom she claims is recorded as an occupancy tenant of the land. There is really no evidence as to the circumstances in which or even as to the time when Mrs. Powell's predecessors first obtained the land. Both sides have indulged in much speculation as to what their respective rights must be. One fact stands out clearly, namely, that for the last fifty or sixty years the land has been used for agricultural purposes, and in the absence of definite evidence as to the respective rights of the parties in the land, we think that the sum awarded should be divided between them in proportion to the values of the interests hitherto enjoyed by them, after making due allowance for the possibility of the rent being enhanced. We accept the finding of the District Judge that the annual value of Mrs. Powell's interest in the land is Rs. 22, and that the annual value of the appellant's interests is Rs. 11. But it seems to us that the whole sum awarded by the Superintendent should be divided amongst them in proportion to the value of their interests, and that there is no justification for what the learned Judge has done, namely, give Mrs. Powell sixteen times the value of her interest and give the appellants the whole of the balance. It would be as wrong in our opinion to give the appellants sixteen times the value of their interests in the land and to give Mrs. Powell the whole of the balance. The result is that we hold that the sum in question should be divided in the proportions of $\frac{1}{3}$ rd and $\frac{2}{3}$ rd, $\frac{1}{3}$ rd going to the appellants and $\frac{2}{3}$ rd to Mrs. Powell, that is to say, Rs. 2,590, to the appellants and Rs. 5,178-8-0, to Mrs. Powell. The decree of the court below is modified accordingly.

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Decree modified.

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versus

AJODHYA SINGH.*

RICHARDS, C. J.
BANERJI, J.*Jurisdiction—Civil and Revenue Court—Matter between rival claimants to a tenancy—Agra Tenancy Act (II of 1899)—Section 95.*

Where a dispute arises between rival claimants to a tenancy the question of title to the tenancy is a question which is cognizable by a civil court and it is not a matter which can be determined under section 95 of the Tenancy Act.

APPEAL under section 10 of the Letters Patent against the decision of Mr. Justice CHAMIER, J., reversing the decree of Babu Ram Chandar Chaudhri, Subordinate Judge of Azamgarh, who confirmed a decree of Babu Lakshmi Narain Tandon, Additional Munsif.

The facts of the case are as follows :—

The plaintiff brought a suit in the revenue court under section 58 of Act II of 1901, for ejectment of the present defendants from a plot of land which he claimed as his occupancy holding and which he alleged had been sublet to the defendants. The defendant claimed that he was not a sub-tenant but that the land was his occupancy holding and he also applied to the revenue court for correction of the revenue registers in which the plaintiff was recorded as occupancy tenant of the land in dispute. The Assistant Collector dismissed the plaintiff's suit on the ground that there was a defect in the frame of the suit. He, however, in the proceedings taken for the correction of revenue registers accepted the defendant's plea and directed the defendant's name to be entered as occupancy tenant of the plot in dispute. The plaintiff then brought the present suit in the civil court on the allegation that the defendant having denied the plaintiff's title was liable to ejectment as a trespasser. The defendant pleaded that the suit was not maintainable in the civil court.

* L. P. A. No. 59 of 1912.

The courts below decreed the claim. On second appeal, the suit was dismissed by the following judgment :—

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CHAMIER, J.—The plaintiffs in the present suit brought a suit against the first defendant under section 58 of the Agra Tenancy Act, alleging that he was a tenant at will of certain land. The first defendant replied that he was the occupancy tenant of the land and he at once took steps by instituting another proceeding to have the revenue record corrected. Both cases came before the Assistant Collector together and were disposed of by one judgment. The suit under section 58 was taken on appeal to the Commissioner, who decided that it was not maintainable, because one of the present plaintiffs did not wish to eject the defendant. The result was that in that suit no decision was given as to the rights of the first defendant. Meanwhile the revenue record had been corrected in the manner suggested by the first defendant. The plaintiffs instituted the present suit in the court of the Munsif, saying that the first defendant had taken the land from them as a tenant, that he had resisted the suit under section 58, that when doing so he had pleaded that he was the occupancy tenant of the land, and that this amounted to a denial of the plaintiffs' title with the result that the plaintiffs were entitled to treat him as a trespasser and they asked for a decree for possession against him. The Munsif decreed the claim and his decision was confirmed by the Subordinate Judge on appeal. In second appeal it is contended on behalf of the first defendant that the suit is not maintainable. It appears to me that this contention is sound and must be accepted. The plaintiffs admit that the first defendant was their tenant. They say that he is liable to be treated as a trespasser, because he set himself up as an occupancy tenant. Before I can hold that the defendant who admittedly was, till recently, a tenant of some kind has become a trespasser, I must hold that he was wrong in claiming to be an occupancy tenant of the land. I cannot decide that he was wrong in claiming to be an occupancy tenant without trenching on the jurisdiction of the rent court. The question whether a person is a tenant at will or an occupancy tenant is one in respect of which a suit can be brought under the Tenancy Act and the decision is reserved exclusively for the revenue court. I hold that the present suit is not maintainable. I allow the appeal and dismiss the plaintiffs-respondents' suit with costs in all courts. I have said nothing about the effect of the order that the revenue record should be corrected, for it is not clear whether it was made under the Revenue Act or a declaration made under the Tenancy Act.

The plaintiff appealed.

Peary Lal Banerji, for the appellant.

The mere fact that the plaintiff alleged the defendant to be his tenant in the former proceedings in the revenue court did not estop him from now alleging that the defendant having denied his title had become a trespasser, and on the

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pleadings in the present suit it is quite clear that the suit is maintainable in the civil court. The defendant never pleaded in the former suit nor does he plead in the present suit that he is the plaintiffs' tenant, and the revenue court not having decided that the relationship between the parties was that of a landlord and a tenant, there was nothing to prevent the present suit being maintained in the civil court.

Zubeda Bibi v. Sheo Charan, [1900] I. L. R., 22 All., 83.

Hamid Ali Shah v. Wilayet Ali, [1900] I. L. R., 22 All., 93.

Moreover, the dispute in the present case was not a dispute between the landlord and the tenant but was a dispute between two rival tenants relating to a tenancy, and such a question was not exclusively reserved for the revenue court but could be decided by a civil court. The point is further covered by authority.

Bhup v. Ram Lal, [1911] I. L. R., 33 All., 795

Shafi-ul-saman, for the respondent.

The case relied on relates to a dispute between two rival claimants to a tenancy on succession.

[RICHARDS, C. J.—There is no principle on which you could argue that the civil courts can only decide between rival claimants when a dispute arises on succession and not otherwise.]

Moreover, the plaintiff having alleged that the defendant was his tenant, and having brought his suit in the revenue court for his ejectment could not bring the present suit in the civil court.

Narain Singh v. Govind Ram, [1911] 8 A. L. J. R., 431.

Peary Lal Banerji, not heard in reply.

The following judgments were delivered :—

Richards, C. J.

RICHARDS, C. J.—This Letters Patent Appeal arises out of a suit in which the plaintiffs sought to recover possession of certain immoveable property, treating the defendant as a trespasser. The facts so far as I consider them material are as follows. Prior to the institution of the present suit the plaintiffs brought a suit in the revenue court seeking to eject the defendant as their sub-tenant. They claimed that they were the occupancy tenants and that the defendant

was their sub-tenant. The plea put in by the defendant was that he was not a sub-tenant but the occupancy tenant of the holding. The Assistant Collector was of opinion that the defendant was, as he alleged, the occupancy tenant. In other words he held that the relation of landlord and tenant did not exist between the plaintiffs and the defendant. As a result of this finding the suit of ejectment in the revenue court necessarily failed. There was an appeal to the Commissioner who held for other reasons that the ejectment suit brought by the plaintiffs failed. The plaintiffs then intituted the present suit to get possession of the property. The question of course upon which the success or failure of the suit depended was whether or not the defendant was the occupancy tenant. The learned Munsif decided in his favour. On appeal the learned Subordinate Judge confirmed the decision of the Munsif. On second appeal to this Court a learned Judge held that the present suit was not cognizable by the civil court, and on that ground allowed the appeal and dismissed the plaintiff's suit.

It seems to me that the question of title to a tenancy arising between rival claimants to that tenancy is a question which is cognizable by a civil court. This has been decided I think in principle in the case of *Zubeda Bibi v. Sheo Charan*⁽¹⁾, in the case of *Hamid Ali Shih v. Wilayat Ali*⁽²⁾, and in the case of *Bhup v. Ram Lal*⁽³⁾. The learned Judge of this Court says, "Before I can hold that the defendant who admittedly was till recently a tenant of some kind, has become a trespasser, I must hold that he was wrong in claiming to be an occupancy tenant of the land. I cannot decide that he was wrong in claiming to be an occupancy tenant without trenching on the jurisdiction of the rent court. The question whether a person is a tenant at will or an occupancy tenant is one in respect of which a suit can be brought under the Tenancy Act and the decision is reserved exclusively for the revenue court." I cannot altogether agree with what the learned Judge has stated above. It is quite true that if a person was claiming to be an occupancy tenant, whilst his landlord was contending that he was a mere tenant at will,

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(1) [1899] I. L. R., 22 All., 83. (2) [1899] I. L. R., 22 All., 93.

(3) [1911] I. L. R., 33 All., 795.

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Richards, C. J.

this would be a question exclusively triable by the revenue court. But that is not the question in the present suit. The question in the present suit is, 'to whom does the tenancy belong, does it belong to the plaintiffs or to the defendant.' If the tenancy belongs to the plaintiffs then they are clearly entitled to treat the defendant as a trespasser, having regard to the plea that he put forward in the revenue court in which he totally denied their title and claimed that he alone was the occupancy tenant. If, on the other hand, the tenancy belongs to the defendant, it is quite clear that the plaintiffs' suit must be dismissed. It has been contended that the present suit is of the nature mentioned in section 95 of the Tenancy Act. In my opinion it is only necessary to read the opening words of that section to see that the section deals with question arising between landlord and tenant, and that it does not in any way apply to rival claimants to any of the various classes of tenancy mentioned in the Tenancy Act.

I, therefore, would allow the appeal as no other question arises.

Banerji, J.

BANERJI, J.—I am also of opinion that the jurisdiction of civil court was not excluded by reason of the provisions of the Tenancy Act. The suit in this case would be cognizable by the civil court unless it came within the purview of any of the clauses of section 95 of that Act. I adhere to the view expressed in the case of *Bhup v. Ram Lal* (1) that where a dispute arises between rival claimants to a tenancy that is not a matter which can be determined under section 95. In the present case the dispute is between persons who claimed to be entitled to the tenancy. There is no question as between either of them and the landlord. The plaintiffs allege that the defendant is a trespasser and they claim to eject him as such. Such a suit could not be brought in the revenue court and the only court which could take cognizance of it is the civil court. It is true that the plaintiffs sued in the revenue court to eject the defendant on the allegation that the defendant was their sub-tenant. Had the revenue court decided that question and had held that the defendant was the tenant of the holding, there might have been some difficulty in

(1) [1911] I. L. R., 33 All., 795.

the plaintiffs' way, but in this case as pointed out by the lower appellate court, the Commissioner did not determine the question whether the plaintiffs were the tenants of the holding, or the defendant was so. He dismissed the plaintiffs' suit by reason of a defect in the frame of the suit. So that the question "who is the tenant of the holding" remained undecided by the revenue court. As both parties claimed to be tenants, the question was one between rival claimants to the tenancy and it could not be taken into the revenue court in any of the forms of suits mentioned in section 95 of the Tenancy Act. The civil court therefore had jurisdiction to hear the case. On the merits that court found in favour of the plaintiffs. They were, therefore, entitled to the decree which was granted by the courts below and this appeal must prevail.

BY THE COURT :—The order of the Court is that we allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate court with costs of both hearings in this Court.

A. C. M.

Appeal allowed.

SHEOPHER SINGH AND OTHERS

versus

DEONARAIN SINGH AND OTHERS.*

Limitation—Declaration of right—Arising of cause of action—Settlement entry subsequently corrected.

At the settlement of 1901 the plaintiffs were recorded in the revenue papers as being in possession of a smaller area of land than they actually held. The plaintiffs remained in possession, and in April, 1909, the Collector corrected the entry but his order was set aside by the Commissioner in August, 1909, and thereafter the defendants interfered with the plaintiffs' possession. The latter then sued for declaration of title to the land. *Held*, that whether or not a cause of action had accrued to the plaintiffs in 1901, the Commissioner's order had given rise to a cause of action to the plaintiffs and their suit having been brought within six years of the date of that order was not barred by limitation.

SECOND APPEAL from a decree of B. J. Dalal, Esq., District Judge of Azamgarh, confirming a decree of Babu Lakshmi Narain Tandon, First Additional Munsif.

*S. A. No. 469 of 1912.

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Banerji, J.

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Suit for declaration.

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The courts below decreed the suit.

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Singh.

Defendants appealed.

Uma Shanker Bajpai, for the appellants.*Surendra Nath Sen*, for the respondents.

The following judgment was delivered by

Chamier, J.

CHAMIER, J.—In this case the courts below have agreed in holding that the plaintiffs are entitled to a declaration of their rights in certain land. The defendants have appealed to this Court contending that according to the rulings of this Court the plaintiffs' claim to a declaration is barred by limitation. The other grounds of appeal have been abandoned before me.

The facts found are that the plaintiffs have all along been in possession of the land in question and were recorded as the proprietors thereof at the fifth settlement. At the sixth settlement owing, it would seem, to the introduction of a new method of recording shares the settlement authorities made an entry in respect of this land which shewed that the plaintiffs were entitled to a smaller area. They objected to the entry but their objection was thrown out in November, 1901. They nevertheless remained in undisturbed possession of all the land to which they were entitled. In April, 1909, the Collector ordered that the entries should be corrected and the plaintiff's rights recorded as at the fifth settlement. But the Commissioner on appeal set aside the Collector's order in August, 1909. In their plaint the plaintiffs say that the defendants began to interfere with them in 1910, on the strength of Commissioner's order of 1909. But according to the finding there can have been no real disturbance of the plaintiff's possession.

The questions for decision are whether time began to run against the plaintiffs in 1901 and, if so, whether a fresh cause of action accrued to them in August, 1909. It is common ground that the period of limitation applicable to the claim for a declaration is six years.

The first question must be answered in the affirmative according to the decisions in *Legge v. Ram Baran Singh*

(1) and *Akbar Khan v. Turaban* (2), but in the negative according to the decision in *Parshotam v. Parmanand*, Miscellaneous No. 279 of 1908, decided by STANLEY, C. J., and BANERJI, J., on December 18th, 1908. On looking into the record of the last mentioned case I find it difficult to reconcile the decision in it with the decisions in the two other cases mentioned. In that case STANLEY, C. J. and BANERJI, J., held that an adverse entry in the records, of which the plaintiff was found to have been well aware, did not set time running against him and that it was only when an actual claim to the land was made upon the strength of that entry that time began to run against the plaintiff. That decision receives some support from the decision of KNOX and AIKMAN, JJ., in *Skinner v. Shanker Lal* (3). In that case an entry had been made in the records adverse to the plaintiff in May, 1899. The defendant brought a suit on the strength of it in 1903. A declaratory suit brought in July, 1905, was held to be within time because, although the plaintiff might have sued in 1903, he was not bound to do so and the suit of 1905 furnished him with a distinct cause of action.

But whether or not it should be held that a cause of action accrued to the plaintiffs in the present case in 1901, it seems to me that an entirely fresh cause of action accrued to them in August, 1909.

The blot on their title was the erroneous entry of 1901. That was removed by the Collector in April, 1909, and if his order had stood, the plaintiffs could not have maintained a suit for a declaration. The Commissioner's order of August, 1909, was a fresh attack upon the plaintiff's title and in my opinion gave them a fresh cause of action notwithstanding that it was passed upon appeal from the Collector's order. As the Collector's order gave the plaintiffs all that they wanted, it cleared their title even if (as has been suggested) the order was not carried out before the Commissioner's order was passed.

I hold that the suit was brought within time. I, therefore, dismiss this appeal with costs.

Appeal dismissed.

(1) [1897] I. L. R., 20 All., 35. (2) [1908] 5 A. L. J. R., 637.

(3) S. A. No. 263 of 1907 decided May 27th, 1908.

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July, 17.

RAFIQ, J.
PIGGOTT, J.

SIS RAM AND OTHERS

versus

ASGHAR ALI.*

Landlord and tenant—Agreement to pay rasum zamindari, over and above cash rent—Public policy.

Where by a *qabuliat* a tenant contracts to pay to the landlord certain *rasum samindari* in addition to cash rent, *held* in a suit by the landlord for recovery of the cash value of the articles the tenant had not delivered that the agreement to pay anything over and above the rent was against public policy.

FIRST APPEAL from an order of C. E. Guiterman, Esq., Additional Judge of Meerut.

The facts of the case appear from the judgment.

Defendants' appeal.

D. R. Sawhny, for the appellants.

Ghulam Mujtaba and *Shafi-us-saman*, for the respondent.

The judgment of the Court was delivered by

Piggott, J.

PIGGOTT, J.—In this case, the plaintiff is the landholder and the defendants are the tenants of certain land. The conditions of the tenancy are determined by a registered *qabuliat*, dated January, the 3rd, 1907. By this instrument the defendants contracted to pay to the plaintiff for the use and occupation of this land an annual rent of Rs. 99, and they further contracted that they would also render to the plaintiff certain zamindari dues (*rasum samindari*) which are set forth in detail, and that in the event of their failing to do so, the plaintiff might claim the cash value of the said dues along with the rent. It may be convenient at once to state what these dues were. The defendants were to deliver to the plaintiff annually 1 jar containing treacle or raw sugar, 25 bundles of cattle fodder, 2 bundles of *bhusa*, 4 jars containing sugarcane juice, 1 basket-load of cow-dung cakes, and 5 *pukka* seers of hemp. The defendants further undertook to give the plaintiff the use of a cart and bullocks

* F. A. F. O. No. 42 of 1912.

"when necessary." We are not concerned in this case with the payment of the cash rent of Rs. 99. Either it has been paid, or at any rate it is not claimed in this suit. The suit as brought appears to be one for damages for breach of a contract in writing registered. It claims the cash value for five years of these zamindari dues which it is alleged the defendants failed to render though bound under contract to do so. The plaint itself suggests no basis of valuation, in respect of the vague agreement to supply a cart and bullocks "when necessary," but the damages for breach of this stipulation are stated at Rs. 15. In respect of the remaining articles which the defendants contracted to supply, the claim appears to be for their cash value at certain rates. The court of first instance, the Munsif of Muzaffarnagar, framed four issues, the first two of which were whether the suit is in fact one for recovery of cesses, and therefore not maintainable by reason of the provisions of sections 56 and 86 of the United Provinces Land Revenue Act, Local Act No. III of 1901, and whether the suit is not cognizable by the civil court. Having found against the plaintiff on each of these issues, the Munsif dismissed the suit. On appeal the learned District Judge held that the suit was essentially one for arrears of rent. He held further that it ought to have been filed as a suit for arrears of rent in the court of an Assistant Collector, and that by reason of the provisions of sections 196 and 197 of the Agra Tenancy Act, Local Act No. II of 1901, it was incumbent upon him to deal with the suit on its merits. He, therefore, remanded the case for trial of the remaining issues, and in the exercise of the discretion conferred upon him by section 197 aforesaid, he addressed his order of remand to the court of the Munsif. The defendants come to us in appeal against this order of remand. It is contended on their behalf that this is not a suit to which sections 196 and 197 of the said Act apply, and further that in any case the suit is one for the recovery of cesses, and that the Munsif's order dismissing the same should be maintained. We have heard arguments at considerable length on both points. In respect of the first point, we are content to remark that if we could have accepted the view of the learned District Judge as to the nature of the suit, we should have been prepared to hold

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that he had jurisdiction to deal with it under the sections of the Agra Tenancy Act already referred to. We are, however, of opinion that the other ground taken in appeal must prevail, and that the Munsif's order dismissing the suit was right. The learned District Judge says that this must be regarded as a suit for arrears of rent, because there is nothing to prevent a tenant from contracting to pay a portion of his rent in cash and another portion in kind. This view of the case is open to objections on various grounds. As a matter of fact, the contract before us is not one to pay a portion of the rent in cash and another portion in kind. There is nothing in the terms of the contract to suggest that the various articles which the defendants undertook to supply were to be the produce of the fields in suit. The cow-dung cakes certainly could not be the produce of their fields, nor had the covenant regarding the cart and bullocks anything to do with the produce of the fields. Nor would it be possible to understand the contract of lease as a whole as binding the defendants to cultivate sugarcane or hemp every year on some portion of the land in order to supply the products of such cultivation to their landholder. Moreover, the suit as brought was not a suit for arrears of rent. The covenant, if enforceable at all, was enforceable according to its terms, namely, that the cash value of the zamindari dues was to be claimed along with the rent. The fact that the plaintiff failed to do this, and endeavoured to bring his case before the court on a different basis, shows that he was conscious of some inherent weakness in his position. That weakness was undoubtedly an apprehension on his part that rent courts at any rate would treat his suit as a claim for cesses and nothing else. We would refer to Mr. M. L. Agarwala's valuable Commentary on the United Provinces Land Revenue Act (No. III of 1901), under section 56 of the said Act, for an elaborate discussion of the question of cesses in these provinces. The term is nowhere defined, and its meaning has been the subject of discussion by this Court in various reported cases. We may refer to *Abdul Hai v. Nathua* ⁽¹⁾, *Sadanand Pande v. Ali Jan* ⁽²⁾, and

(1) [1903] 1 A. L. J. R., 537, at 540.

(2) [1909] 7 A. L. J. R., 176.

Sheoambar Ahir v. The Collector of Azamgarh(¹). It is clear that the cesses referred to in section 56, aforesaid, cannot be payments for some purpose of public convenience such as were suggested by a Judge of this court as consonant with the primary notion of the word "cess" in the first of the rulings above referred to. Taking the words of the contract between the parties as they stand, the position seems to us fairly clear. The plaintiff in this case was giving the defendants a perpetual lease of certain land at a cash rent, and no doubt felt that in so doing he was conferring something of a favour. He had, or conceived himself to have, a claim for certain customary dues payable by his tenants on account of the occupation of the land, dues which are of the nature of rent and payable in addition to the rent of tenants. These customary dues have not been recognized by the Settlement Officer at the last settlement, and no doubt the plaintiff was aware that he could not maintain any suit for the recovery of the same apart from some special contract. He endeavoured, therefore, to bind the defendants by the express terms of the contract to pay him the said dues. We are, both of us, of opinion that this contract cannot be enforced. The test which the Board of Revenue has applied in its directions to Settlement Officers regarding the question of recording or not recording customary dues of this nature, is that a cess may be recognized when it is of the nature of a fixed sum calculated on the rent, or on some other defined basis. "Thus if the tenant is admitted to pay regularly on his rent one anna in the rupee, or one seer in the maund as *kharch*, that will be a cess which should be deemed to form part of his rent. If the so-called cess is said to be so many bundles of *bhusa* or cakes of fuel or the like, it cannot be admitted to be part of the rent and should not be recorded." In the opinion of one of us the claim in the present case can only be regarded as a claim for a cess within the meaning of section 56 of the Land Revenue Act, and is as such barred by the provisions of that section. The other of us inclines rather to treat the suit on its original basis as a suit for damages for breach of contract, and in this view the suit must fail, and this for two reasons: on the terms

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(1) [1911] 9 A. L. J. R., 431.

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of the contract itself the cash value of the zamindari dues, if not rendered, was to be claimed along with the rent and not by way of separate suit for damages. In the second place the contract as it stands appears to be contrary to public policy and intended to defeat the object of the provisions of the Land Revenue Act, particularly of sections 56 and 86. The object of the Legislature seems to have been to rid the courts once and for all of claims for customary dues or services of a vague and uncertain nature, the precise value of which would be difficult, if not impossible, of determination. Landlords claiming to be entitled to receive by way of customary dues or services something more from their tenants on account of the use and occupation of their holdings over and above their rent were required to bring such claim before the Settlement Officer at the time of settlement, and the latter was to judge once and for all whether such claims could in their nature be admitted and recorded. The general policy of the Act is that the Government may be assured that landholders were not receiving from their tenants on account of the use and occupation of their holdings any payments which were not recognized either under the head of rent or under the head of cesses in the public records which form the basis of assessment for the Government demand. The contract before us seems to be opposed to the policy of the law and in contravention of its provisions. We are, therefore, agreed that this appeal must prevail. We set aside the order of remand passed by the lower appellate court and restore the decree of the court of first instance dismissing the suit. The plaintiff will pay the costs of the defendants throughout.

Appeal allowed.

KHURSHED-UN-NISSA

VERSUS

ALIM-UN-NISSA.*

Pre-emption—Decree ordering payment within a certain time—Payment not made—Appeal whether maintainable.

CIVIL.

1912.

July, 22.

RICHARDS, C. J.
TUDBALL, J.

In a suit for pre-emption the decree for possession was made conditional upon the plaintiff paying the purchase-money into court within one month. The plaintiff appealed against the condition laid down by the first court. The month expired during the pendency of the appeal and the money was not deposited. The appellate court dismissed the suit on the ground that the condition had not been fulfilled: *held* that the condition itself having been the subject of appeal, the suit should not have been dismissed on that ground.

SECOND APPEAL from a decree of D. R. Lyle, Esq., District Judge of Shahjahanpur, reversing a decree of Babu Gobind Prasad, Munsif of East Badaun.

Musammat Khurshed-un-nissa brought a suit for pre-emption with reference to some property purchased by Musammat Alim-un-nissa on the basis of a custom of pre-emption. The Munsif found that the custom set up existed and decreed her suit. The judgment went on to provide that the claim was decreed "on condition of the plaintiff paying Rs. 530 to the defendant within thirty days from this date. In case of default the suit will stand dismissed with costs". On an appeal to the District Judge by the defendant it was brought to his knowledge and not denied by the plaintiff that the condition had not been complied with and no money had been paid. He allowed the appeal on that sole ground without going into any other matter.

Plaintiff appealed.

Muhammad Ishaq Khan, for the appellant.

I could ask for time in the execution department.

[TUDBALL, J.—No, you asked for it from the appellate court.]

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Besides the matter was *subjudice*. It was the very decree appealed against; and its provisions could not destroy my claim for pre-emption.

Tej Bahadur Sapru, for the respondent.

A court could mention a time within which money was to be paid unconditionally or it could order plaintiff to pay within a specified time of the decree becoming final. In the former case the condition had to be complied with.

[RICHARDS, C. J.—Supposing the appellant mentioned in his grounds of appeal that he appealed against the decree saying he had to pay in the money within 30 days.]

[TUDBALL, J.—When the appellate court confirmed the decree of the lower court, then would be the time to say that the condition had not been fulfilled.]

[RICHARDS, C. J.—That is, if the appellate court did not extend the time.]

Order 19, Rule 20, clearly laid down what the plaintiff had to do. She could deposit the money and then appeal.

[RICHARDS, C. J.—But the plaintiff had appealed against that very matter.]

The judgment of the Court was delivered by

Tudball, J

TUDBALL, J.—This and the connected appeal No. 1366 of 1911, arise out of one and the same pre-emption suit. The claim is based upon a custom of pre-emption. The plaintiff challenged the accuracy of the price entered in the sale-deed. The court of first instance held that the custom was proved and the consideration entered in the sale deed was correct. It granted a decree conditional on the plaintiff paying into court the amount of the purchase money within one month. The plaintiff appealed against that decree simply in regard to the condition laid down by the court of first instance as to the payment of the purchase money. The defendant also appealed against the decree pleading that the plaintiff had failed to establish the custom. By the time the appeals came on for hearing in the court below, the one month allowed in the original decree had elapsed. The plaintiff had not paid into court the amount as ordered by that decree. The lower appellate court thereupon held that as he had failed to do so,

the decree of the court below was one which dismissed the plaintiff's suit, and that, therefore, the plaintiff's appeal must fail and the defendant's appeal must succeed. On this ground alone the court below dealt with two appeals. It is urged here with great force that the plaintiff's appeal was against the very condition owing to the non-fulfilment of which (according to the lower appellate court) the suit had stood dismissed. We think that this contention is sound. It might no doubt have been advisable for the plaintiff to pay the money into court in view of a possible failure of his appeal, and the refusal of the appellate court to extend the time. If his appeal succeeded on the question of consideration, the court was bound to give him time to pay the amount due.

We, therefore, allow the appeal, set aside the decree of the court below and remand the case to that court for re-admission to the file and the decision thereof according to law. The costs of this appeal will abide the result of the case.

S. M.

Cause remanded.

PADARATH AND OTHERS

versus

DULAM AND OTHERS.*

Tort—Malicious prosecution—Suit for damages—First court believing evidence of prosecution—Second court rejecting it—Whether sufficient evidence of reasonable and probable cause.

P. and others lodged a complaint against D. and others, charging them with theft and assault which the Magistrate believed, but the appellate criminal court disbelieved. D. and others sued P. and others for damages for malicious prosecution. *Held*, that in such a case the mere fact of one court having believed the complaint is not sufficient evidence of reasonable and probable cause. What has to be seen in cases of this kind is what is the conduct of the complainant before and after making the charge and was the charge false to his knowledge. *Jadubar Singh v. Sheo Saran Singh*, I. L. R., 21 All., 26, distinguished.

° S. A. No. 716 of 1911.

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1912.

Khurshed-un-nissa

v.

Alim-un-nissa.

Tudball, J.

CIVIL.

1912.

August, 7.

KNOX, J.

CIVIL.
 1912.

Padarath
 v.
 Dulam

SECOND APPEAL from a decree of Pandit Ram Avatar Pande, District Judge of Azamgarh, confirming a decree of Babu Raghunath Prasad, Munsif.

Suit for damages for malicious prosecution.

The courts below decreed the suit.

Defendants appealed.

M. L. Agarwala, for the appellants.

Muhammad Ishaq, for the respondents.

The following judgment was delivered by

Knox, J.

KNOX, J.—This appeal arises out of a suit brought by one Dulam and others. Their allegation in the plaint is that the defendants merely through enmity without any reasonable cause made a report against them in bad faith and lodged a false complaint in the criminal court, charging them with theft and assault. The defendants admitted having made the report of theft and assault and further, that they prosecuted the plaintiff, but they urged that the charge brought by them was a true one. Both the courts below have found, that the report and the charge were false, that the defendants were actuated by malice in bringing them and granted the plaintiffs a decree for damages. The defendants come here in appeal and say that under the circumstances of the case no suit for false prosecution lies. Moreover, they added that there was reasonable and probable cause for the prosecution which they started. The learned counsel who appeared for the appellants, supported his contention on these grounds, by reference to the case of *Jadubar Singh v. Sheo Saran Singh*⁽¹⁾. In that case, from one point of view the circumstances were very similar to those in this case, the court before which the prosecution was instituted having in both cases, convicted upon the charge laid before it. But the court above both in that case and in this, set aside the conviction of the criminal court of first instance. But there it seems to me the resemblance begins and ends. It is true that in the case of *Jadubar Singh v. Sheo Saran Singh*, my brother BANERJI, J., appears to have laid down that where a Magistrate believes in the truth of the complaint brought by any one, that alone is sufficient

(1) [1898] I. L. R., 21 All, 26

evidence of the existence of reasonable and probable cause. Later on in the judgment he returns to the same point and changes the words "sufficient evidence of the existence of reasonable and probable cause" to "strong evidence to show that a case was not brought without reasonable and probable cause." What we have to see in cases of this kind is what is the conduct of the complainant before and after making the charge and was the charge false to his knowledge. When a person finds that an offence has been committed against him or his property he may have either direct personal knowledge of the person who committed the offence or not having such direct and personal knowledge he may from other causes draw an inference as to who the offenders were. In the latter case when he thinks fit to put the law in motion, he should be careful to state that he acts upon suspicion which he considers justified on such and such grounds. In the present case, the defendants, here appellants, stated that they had seen the robbery committed by the plaintiffs. This is what the court of first instance says. I cannot, however, find from the record any copy either of the complaint or of the first report, and I think it most important before I decide this appeal that those papers should be before me. I direct that the record in the case of *King-Emperor v. Dulam and others*, decided by the court of Sessions of Azamgarh on December 22, 1909, together with the Magistrate's record be sent for. Upon the arrival of the record let the case be put up for hearing.

May 28, 1912.

KNOX, J.—The report has now been found, it is paper No. 33, on file B of 126 of 1909. It is a very positive document, stating that Dukhi saw the thieves and that they were persons who are now respondents. Under these circumstances the appeal fails and is dismissed with costs.

Appeal dismissed.

CIVIL.

1912.

Padarath

v.

Dulam

Knox, J.

CRIMINAL.

1912.

August, 7.

KNOX, J.
BANERJI, J.

IMAMI

versus

KING-EMPEROR.*

Municipalities Act (I of 1900), section 128 (h)—Rules framed under—Power to frame rules charging fees from petty vendors on patris of road—Rules ultra vires—Place of public resort.

The intention of the legislature by framing section 128 (h) 1 of the Municipalities Act does not seem to be to give the Municipal Board a power to inspect and properly regulate all places of public resort. In interpreting an act like the Municipal Act, which encroaches on the rights of the subjects, the legislature is expected to manifest its intention clearly and beyond reasonable doubt. Where the legislature expressly mentioned all places of public resort but the *patris* of a street was not mentioned, *held* that it was not a place of public resort and entertainment.

Held further, that the Municipal Board has no power to frame rules charging fees for licenses to hawk articles of food on the public street, and the rules so framed and confirmed by local Government were *ultra vires*.

CRIMINAL REVISION from an order of J. N. G. Johnson, Esq., Magistrate, First Class, of Allahabad.

Satya Chandra Mukerji (with him *Jogindro Nath Chaudri*), for the applicant.

R. Malcomson (Assistant Government Advocate) and *Durga Charan Singh*, for the Crown.

The judgment of the Court was delivered by

Banerji, J.

BANERJI, J. :—Imami, who has been found guilty under section 132 of Local Act I of 1900, because he had committed a breach of a rule lawfully promulgated by the Municipality of Allahabad under section 128 (h) (i), has applied to this Court to interfere in revision and the two grounds taken in the petition are:—(1) "That the Municipal Board of Allahabad had no power to frame rules charging fees for licenses to hawk articles of food on the public street and ; (2) that the words "place of public entertainment and resort" in section 128 (h) (i) of the Municipalities Act cannot be construed to mean the *patris* of a street."

* Cr. Rev. No 724 of 1911.

The particular part of Allahabad in which Imami is said to have committed a breach of Municipal rules is a strip of land on the Balua Ghat road. It appears that on May 18, 1910, the Municipal Board of Allahabad published certain rules for the regulation of *tah-bazari* in the Allahabad Municipality. These rules profess to have been passed under section 128 (h) (i). They were duly confirmed by the local Government and by them no person is allowed to sell or expose for sale any goods in any street or public place under the control of the Board except by permission of the Board and on payment of such fees as the market committee may fix. If the making of these rules is within the powers invested by law in the Municipality of Allahabad, then Imami has undoubtedly committed a breach of the rule. On the other hand, if they are *ultra vires* Imami has not committed any breach.

The Municipal Board derive their power to make rules from Local Act No. 1 of 1900. Section 128 of that Act lays down, that any Board may by rules provide for the inspection and proper regulation *inter alia*, of any place of public entertainment and resort, and for the charge of fees for the use of such places when vested in the Board. The question, we have to decide, is whether power has been given under this section to the Municipality, to provide for (1) any place of public entertainment; (2) any place of public resort. This is the way in which the Municipal Board read the rule. They contend that they are empowered to provide for the inspection and proper regulation not merely of any place of public entertainment but also of any place of public resort. The petitioner, on the other hand, contends that unless it can be shown that this strip of land is a place, both of public entertainment and public resort, the Municipal Board are not empowered to provide for its inspection and to charge fees for its use. The question is by no means an easy one to decide and we have taken time to consider our judgment. We wished to find whether there existed any precedent which might show how other courts have interpreted similar rules. Careful search has been made and no precedent could be found, and we are left to interpret the Act by the ordinary rules for interpretation of Acts of this

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nature. The first consideration is, whether we may rightly conclude that it was the intention of the legislature to give the Municipality powers, to provide for the inspection and proper regulation of every place of public resort. This will include places for worship, such as temples, mosques, cathedrals and churches. All these are places of public resort. The same reasoning may apply to courts of justice and many other public buildings to which the public from time to time resort. It seems to us far from likely that such was the intention of the legislature.

Next, bearing in mind that when we interpret an Act like the present, which is an Act encroaching on the rights of the subject, we have a right to expect that the legislature will manifest its intention plainly, if not in express words at least by clear implication and beyond reasonable doubt [Maxwell's Interpretation of Statutes, 4th Edition, page 429, and cases cited therein]. On turning to the actual words used we find a number of places mentioned as places which may be inspected and regulated. Each of these is divided from the place following it by a comma. With the exception of "dairies and bakeries", which are lumped in one, each place is separately named and falls into a separate category. The last category appears to include places of public entertainment and resort, and we hold that if it had been the intention of the legislature that places of public resort which are not places of public entertainment, should be inspected and properly regulated, the two kinds of places would have been separately named. In our opinion the word, "public entertainment and resort" cannot be read distributively. The one argument that tells against this interpretation is the collocation of dairies and bakeries in this very same section 128 (4) (1). But whether this was due to an oversight or to some other cause, we need not in this case consider.

Furthermore, we doubt whether it was ever the intention of the legislature, in section 128 (4) (1) to provide for regulation of streets. Provisions for regulation of streets occur in other parts of the Act, and it seems a forced idea to talk of providing for the inspection of a street or the land adjoining the same.

Finally, we might add, that the word 'entertainment',—so far as Mr. Murray's Dictionary is any guide—could not properly be applied to a street or a *patri* adjoining a street.

For all these reasons, we have arrived at the conclusion that the rule, with the breach of which Imami is charged, was not a rule which the Municipal Board of Allahabad was empowered to pass under section 128 (*h*)(1). We, therefore, set aside the conviction and direct that the fine, if paid, be refunded.

Application allowed.

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—
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—
Banerji, J.

BARKATULLAH

versus

SADHO KALWAR AND OTHERS.*

Penal Code—(Act XLV of 1862), section 211—False information to Police.

The offence of laying false information to the police falls under the first paragraph of section 211, Indian Penal Code.

CRIMINAL REVISION from an order of B. J. Dalal, Esq., Sessions Judge of Azamgarh.

E. A. Howard, for the applicant.

G. P. Boys and *R. K. Sorabji*, for the opposite parties.

The following judgment was delivered by

RAFIQ, J.—The facts which have given rise to the present application in revision are as follows :—

On the 2nd of December, 1911, Sadho, Mewa and Bhairon, the opposite party, informed the police that Barkatullah, the applicant and one other person, had slaughtered a cow in their house, the blood of which had flowed out into the street. The police inquired into the report but no further action was taken in the matter.

On the 19th of January, 1912, Barkatullah filed an application before the Magistrate at Azamgarh, asking for sanction under section 195 of the Code of Criminal Procedure,

* Cr. Rev. No. 432 of 1912.

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to prosecute the three informants under section 211 of the Indian Penal Code. The Magistrate rejected the application on the 6th of March, 1912, holding that the offence, if any, of the three informants fell under section 182 of the Indian Penal Code and not under section 211 of the Indian Penal Code. The applicant preferred a revision to the court of the Sessions Judge from the order of the Magistrate. The learned Judge is of opinion that section 211 of the Indian Penal Code would apply only in cases where the alleged false information related to cognizable offences. He also rejected the application. It is contended before me on behalf of the applicant that the offence of laying false information to the police falls under section 182 of the Indian Penal Code as well as under paragraph 1 of section 211 of the Indian Penal Code. For the opposite party this contention is questioned. There is no doubt that some of the High Courts have held that the offence of laying false information to the police falls under section 182 of the Indian Penal Code only. But the current of rulings in this Court is otherwise. It has been held in several cases by this Court that the offence of laying false information to the police falls under the first paragraph of section 211 also, *vide King-Emperor v. Jagmohan and others*(¹), and *Hardwar Pal v. King Emperor*(²). On the authority of these cases it is clear that the offence complained of by the applicant and alleged to have been committed by the opposite party does fall under the 1st paragraph of section 211 of the Indian Penal Code. I, therefore, set aside the orders of the lower courts and direct that the application be disposed of by the Magistrate according to law.

Application allowed.

(1) [1906] 6 A. L. J. R., 989

(2) [1912] 10 A. L. J. R., 61

GEORGE LANGRIDGE

versus

GRACE ATKINS.*

* *Jurisdiction—Indian Penal Code (Act XLV of 1860), section 406—Criminal breach of trust—Code of Criminal Procedure (Act V of 1898), section 177.*

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1912.

September, 26.

RAFIQ, J.

G. L. was entrusted with a machine at Bombay and had misappropriated it and the money made out of it. G. A., who claimed to be the owner of the machine alleging that G. L. had committed criminal breach of trust with respect to it, filed a complaint in the court of the Cantonment Magistrate, Cawnpore. G. L. applied to the High Court to quash the proceedings on the ground that the court at Cawnpore had no jurisdiction. *Held*, that as the loss to the complainant had accrued to her at Cawnpore and as loss entailed by criminal breach of trust is a consequence, that completes the offence, the court at Cawnpore had jurisdiction to try the case.

CRIMINAL REVISION from an order of W. F. Kirton, Esq., Sessions Judge of Cawnpore.

E. A. Howard, for the applicant.

C. Dillon, for the opposite party.

L. M. Banerji (for Assistant Government Advocate), for the Crown.

The following judgment was delivered by

RAFIQ, J.—This is an application in revision which raises a point of jurisdiction. The applicant, George Langridge, contends that the Cantonment Magistrate of Cawnpore has no jurisdiction to try him on a charge under section 406 of the Indian Penal Code. According to the case for the prosecution the applicant and Atkins, the husband of the opposite party, were in the service of the East Indian Railway in 1911 and both resided with their wives in Cawnpore. The two men were friends and they decided to improve their prospects by leaving the railway service and touring the country with an American machine called the "American Circling Wave". Atkins supplied the money for the machine and he went with the applicant to Bombay in October, 1911, and took

Rafiq, J.

* Cr. Rev. No. 681 of 1912.

CRIMINAL.

1912.

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Rafiq, J.

delivery of it. The applicant was to serve as an assistant of Atkins and was to get part of the profits as his remuneration. Atkins remained in Bombay for about three months. He fell ill and died there on the 23rd of January, 1912. Before his death he executed a will of all his property in favour of his wife, Mrs. Atkins. During his illness he permitted the applicant to take the machine to some place in Madras to work it there during a fair for their mutual benefit. A few days after the death of Atkins, the applicant presented an agreement in writing to Mrs. Atkins, for signature, claiming half the machine. Mrs. Atkins refused to sign the said agreement and denied the title of the applicant to any part of the machine. The applicant then went away without returning the machine to Mrs. Atkins or rendering to her any account of the profits made before or after the death of her husband. She filed a complaint in the court of the Cantonment Magistrate of Cawnpore, against the applicant, under section 406 of the Indian Penal Code. Mrs. Langridge, the wife of the applicant, also filed a complaint against him under the maintenance section in the same court. The applicant was arrested on the two warrants and taken to Cawnpore. He objected to the jurisdiction of the Cantonment Magistrate to try him on the charge of criminal breach of trust on the ground that the offence, if committed, at all was committed outside Cawnpore and in fact outside the United Provinces. The objection was overruled. The applicant preferred a revision to the court of Session which was rejected. He has come up in revision to this Court and repeats his objection. It is argued by the learned counsel for him that section 179 of the Code of Criminal Procedure under which the Cantonment Magistrate appropriates the jurisdiction to himself and with whom the Judge has agreed is inapplicable to the present case. The applicant has done no criminal act within the jurisdiction of the Cawnpore courts, nor has any consequence ensued modifying or completing such act within the jurisdiction of those courts. The alleged criminal breach of trust was admittedly committed outside Cawnpore; and as under the law the offence was completed as soon as the dishonest misappropriation or conversion of the machine or the profits took place, there was no

consequence of the said misappropriation left to modify or complete the offence with which the applicant stands charged. In support of this contention the following cases are cited :— *Babu Lal v. Ghansham Das* ⁽¹⁾, *Ganeshi Lal v. Nand Kishore* ⁽²⁾, *Sirdar Meru v. Jethabhai Amirbhai* ⁽³⁾, and *Nirbhe Ram v. Kallu Ram* ⁽⁴⁾. For Mrs. Atkins it is contended that the jurisdiction of a criminal court is determined by the allegations made in the complaint filed before it. In her complaint she stated that the applicant was a mere agent in charge of the machine in question, permitted to exhibit it at various places for her and her husband's benefit and was bound to return it and to account to her for the profits at her place of residence, *i. e.*, at Cawnpore. His failure to do so gives the courts at Cawnpore jurisdiction to try him on her complaint. It is admitted that the words "and of any consequence which has ensued" in section 179 of the Code of Criminal Procedure, refer to a consequence which completes or modifies the act alleged to be an offence. But in criminal breach of trust loss is a necessary consequence and completes the offence. The unlawful retention by the applicant of the machine and profits of its exhibition has entailed loss on Mrs. Atkins at Cawnpore, and hence the courts at Cawnpore have jurisdiction to try him. The learned counsel for Mrs. Atkins relies on the following cases in support of his argument: *Queen-Empress v. O'Brien* ⁽⁵⁾, and *Mahadeo v. King-Emperor* ⁽⁶⁾. Moreover, it is urged that if the applicant's interpretation of section 179 of the Code of Criminal Procedure is allowed, Mrs. Atkins has no remedy. She does not know where was the machine at the time of her husband's death, or at the time she demanded its return, or at what places has the applicant exhibited it. In fact, she could not for a long time trace the address of the applicant and does not know even now where he is concealing the machine. It appears to me that both parties are agreed as to the interpretation of section 179 of the Code of Criminal Procedure. The point of difference between them is whether loss resulting from criminal breach of trust can be said to be such a consequence as completes the offence. This Court, if I have

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(1) [1908] A. W. N., p. 115.

(2) [1912] 10 A. L. J. R., 45.

(3) [1906] 8 Bom. L. R., 513

(4) [1901] 4 O. C., 376.

(5) [1896] L. L. R., 19 All., 111.

(6) [1909] 7 A. L. J. R., 319.

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read the rulings rightly, has always held that loss entailed by criminal breach of trust is a consequence that completes the offence. The case of *Queen-Empress v. O'Brien*⁽¹⁾ is directly in point. To the same effect is the case of *Mahadeo v. King-Emperor* ⁽²⁾. None of the cases cited for the applicant with the exception of the Oudh case helps him. In the case of *Babu Lal v. Ghansham Das*⁽³⁾, Babu Lal was prosecuted for cheating at the instance of Ghansham Das, in the court of the Joint Magistrate of Aligarh, with regard to the negotiation of certain *hundis*. It was found that as the said *hundis* were neither negotiated in the district of Aligarh, nor was any loss sustained by Ghansham Das on the registration of those *hundis*, the Joint Magistrate of Aligarh had no jurisdiction to entertain the complaint. The facts of the case, *Ganeshi Lal v. Nand Kishore*⁽⁴⁾, were, that the complainant had his principal shop in Cawnpore and a branch shop at Gauriganj, district Sultanpur, in Oudh. The profits made at the latter shop were to be remitted to the principal firm at Cawnpore. The accused misappropriated some money of the branch shop. The complainant prosecuted him in Cawnpore on the charge of embezzlement. On an objection by the accused it was held by Mr. Justice KARAMAT HUSAIN that the Cawnpore court had no jurisdiction. The learned Judge came to that conclusion presumably on the ground that loss was sustained primarily by the branch shop. It was for that reason that he made a distinction between the case before him and that of *Queen-Empress v. O'Brien*⁽⁵⁾. He did not differ from the ruling in the case of *O'Brien*, nor did he question the proposition that in a criminal breach of trust loss to the victim was a consequence which completed the offence. In the case of *Sirdar Meru v. Jethabhai Amirbhai* ⁽⁶⁾, the complainant was assaulted by the accused and his leg broken within the Baroda territory. The complainant was taken to a hospital within the British territory where he was detained for 57 days, during which period he was unable to follow his ordinary pursuits. He originally filed in a British court a complaint against the accused for causing him grievous hurt. The accused raised an objection

(1) [1896] I. L. R., 19 All., 111.

(2) [1909] 7 A. L. J. R., 319.

(3) [1908] A. W. N., p 115.

(4) [1912] 10 A. L. J. R., 45.

(5) [1896] I. L. R., 19 All., 111.

(6) [1906] 8 Bom., L. R., 513.

of want of jurisdiction. It was held that as the offence of causing grievous hurt was complete within the Baroda territory inasmuch as the leg had been fractured in that territory, the objection of the accused must prevail. This case does not help the applicant at all. It is true that the inability of the complainant to follow his ordinary pursuits was a consequence of the fracture. But that inability did not in that particular case complete or modify the offence of the accused. Had the leg of the complainant not been broken and had an injury been caused which necessitated the complainant's detention in a British hospital for twenty days or more, the decision of the Bombay High Court would, I presume, have been different. According to the definition of grievous hurt inability to follow one's ordinary pursuits for twenty days or more is only one of the tests of grievous hurt, *vide* section 320 of the Indian Penal Code. The Oudh case, as I have already remarked, is in favour of the applicant. But this Court has taken a different view as appears from the cases cited above. I therefore find that the Cantonment Magistrate of Cawnpore has jurisdiction to entertain the complaint against the applicant. The application of the latter fails and is rejected.

Application rejected.

CRIMINAL.

1912.

George
Langridge
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Rafiq, J.

KANHAI SINGH AND OTHERS

versus

KING-EMPEROR.*

Criminal Procedure Code (Act V of 1898), section 537—Judgment at variance with directions given by law—Defect not cured.

Section 537 of the Code of Criminal Procedure does not cure the defects in a judgment which was at variance with the directions given by law and materially prejudiced the appellants at the trial of the appeal.

CRIMINAL REVISION from an order of L. Marshall, Esq., Sessions Judge of Moradabad.

G. P. Boys, for the applicants.

* Cr. Rev. No. 698 of 1912.

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1912.

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RAFIQ, J.

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1912.

Kanhai Singh

v.

King-Emperor

Rafiq, J.

L. M. Banerji (for Assistant Government Advocate), for the Crown.

The following judgment was delivered by

RAFIQ, J.—This is an application in revision under section 439 of the Code of Criminal Procedure, questioning the judgment of the learned Judge of Moradabad, by which he upheld the conviction of the applicants made by the Deputy Magistrate. The only reason on which the applicants challenge the judgment of the lower court is that it is not in accordance with law. It appears from the judgment of the learned Judge, that the notes that he made of the arguments of the counsel for the parties have to be considered as part of his judgment. He opens his judgment by saying that he has appended the notes of the arguments for the parties. The learned Judge does not discuss the evidence in the case nor refers to the witnesses whom he believes and on whose evidence he comes to the conclusion that applicants were guilty of the charges of which they were convicted. The judgment is clearly at variance with the directions given in sections 367 and 424 of the Code of Criminal Procedure as regards the writing of judgment. It is suggested for the Crown that the defects in the judgment are cured by section 537 of the Code of Criminal Procedure. The reply for the applicants is that the defects complained of have materially prejudiced them in the trial of their appeal. The judgment in question was not delivered by the learned Judge until a few months after the case had been argued before him. The tenor of the judgment shows that the case of the applicants was not present to his mind in all its aspects which had been presented to him at the time of argument. I think that the contention of the applicants is sound and must prevail. I allow it and set aside the order of the learned Judge, dated the 15th of August, 1912, and direct that the appeal be reheard and disposed of according to law.

Application allowed.

FULL BENCH.

DEBI PRASAD

versus

BHAGWAN DIN AND OTHERS.*

Landlord and tenant—Ex-proprietary tenant—Sale by a co-sharer of his share—Tenant of all co-sharers.

Where in a village all the co-sharers are proprietors of *sir* land and one of them sells his zamindari and ceases to be a co-sharer, he becomes the ex-proprietary tenant of his *sir* land and the tenant of all the co-sharers of the *patti* including the purchaser of his share.

APPEAL under section 10 of the Letters Patent from a judgment of Mr. Justice Sir HARRY GRIFFIN, reversing a decree of C. Rustomji, Esq., District Judge of Allahabad, who confirmed a decree of Babu Pirthi Nath, Subordinate Judge.

Facts of the case appear from the judgment of

GRIFFIN, J.—The plaintiffs are the proprietors of one anna share of *patti* Ram Dayal. The defendants 2 to 4 owned the remaining $3\frac{1}{2}$ annas share in the same *patti*. Their right to this share has been acquired by defendant No. 1, Debi Prasad. Defendants 2 to 4 were in possession of certain plots, some as *sir*, some as *khudkasht*, and some for a period of less than twelve years. The plaintiffs in this suit sought for a declaration of their right to collect their proportionate share of the rent payable by defendants 2 to 4 on the lands in this *patti*. The courts below have decreed the plaintiff's suit only in so far as the plots in the possession of the defendants 2 to 4 as non-occupancy tenants are concerned. The courts below are of opinion that defendant, Debi Prasad, who has acquired the proprietary rights of defendants 2 to 4 was alone entitled to collect the rent payable by defendants 2 to 4, on the land held by them as ex-proprietary tenants. The plaintiffs appealed and an objection also has been filed on behalf of the defendants. An issue was remitted by this Court to ascertain whether defendant No. 1, Debi Prasad, had collected the entire rent from defendants 2 to 4, hitherto, or whether the plaintiffs had been collecting their proportionate share of the rent payable by these tenants. The finding of the court below on this issue is that the plaintiffs have been collecting their proportionate share of rent due from defendants 2 to 4 direct. This finding is in favour of the plaintiffs-appellants. The learned Advocate who appears on

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August, 6.

RICHARDS, C. J.
BANERJI, J.
TUDBALL, J.

* L. P. A. No. 8 of 1912.

CIVIL

1912.

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v.
Bhagwan Din.

behalf of the deendants supports the view taken by the court below and contends that his clients as purchasers of the rights of defendants 2 to 4 are entitled to collect the rent payable by these defendants on land held by them as ex-proprietary tenants to the exclusion of the plaintiffs. The right of the plaintiffs to a share in the profits is not denied. In my opinion this appeal must succeed. The *patti* is an undivided one. The defendant No. 1 acquired the proprietary rights of defendants 2 to 4. Thereupon defendants 2 to 4 became the ex-proprietary tenants of the entire body of co-sharers. No provision of law has been pointed out to me which confers on defendant No. 1, the exclusive right of collecting rent from defendants 2 to 4 in respect of land held by them as ex-proprietary tenants. No custom or contract to that effect has been pleaded. I allow this appeal, set aside the decree of the courts below and decree the suit for a declaration that the plaintiffs are entitled to recover rent from defendants 2 to 4 to the extent of their share in respect of all the lands in the occupation of defendants 2 to 4 as tenants. The plaintiffs shall obtain their costs throughout.

Defendants appealed.

Sundar Lal and *Vishnu Ram Mehta*, for the appellant.

Haribans Sahai and *Umashankar Bajpai*, for the respondents.

The judgment of the Court was delivered by

Richards, C. J.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiffs claimed a declaration that they were zamindars and owners of a one anna out of a $4\frac{1}{2}$ annas share in each of the plots in dispute which were detailed in the plaint and are entitled to realise the rent from the defendants 2—4. The facts are—that one Ram Dayal owned a *patti* called *patti* Ram Dayal, the extent of which was $4\frac{1}{2}$ annas of the mahal. After his death in some way which it is unnecessary to consider, one anna fractional share therein went to the plaintiffs and the remaining $3\frac{1}{2}$ annas went to the defendants 2—4. The rights of the defendants 2—4 have been acquired by defendant No. 1, the result of which was that defendants 2—4 became ex-proprietary tenants of the *sir* which they held prior to the acquisition of their proprietary rights by defendant No. 1. The real question is whether the defendants 2—4 are in the events which have happened, the ex-proprietary tenants of the defendant No. 1 or the ex-proprietary tenants of all the proprietors in the *patti*, that is to say, of the plaintiffs and defendant No.

1. This was the question which came before a learned Judge of this Court, and from whose judgment this appeal under the Letters Patent has been preferred. The learned Judge came to the conclusion that the defendants 2—4 were the ex-proprietary tenant of all the proprietors of the *patti*, and not of the defendant No. 1 alone. In our opinion this in view of the circumstances of this case is correct. It seems to us that prior to the sale all the co-sharers in the *patti* were the proprietors of all the plots that went to make up the *patti* irrespective of the *sir* rights of the several co-sharers. For the purpose of distribution of profits a hypothetical rent is in a case like the present fixed upon the *sir* land, and all the co-sharers' share in this hypothetical rent. It is quite clear that if the proprietary body were the proprietors of the *sir* prior to the sale, the particular co-sharer who sells his proprietary rights cannot transfer anything more than his own share. In other words, he is not entitled to sell the whole proprietary title in the land which he held as *sir*. We think it logically follows that as soon as the co-sharer ceases to be a co-sharer and becomes an ex-proprietary tenant of his *sir*, he becomes the tenant of all the co-sharers in the *patti* including the purchaser of his share. The plaintiffs were therefore entitled to share in the rent payable by the defendants 2—4. It is to be noted that this is not a case where the vendor is really the sole owner of the proprietary title in the lands which he holds as *sir*. There are some such cases. We dismiss the appeal with costs.

Appeal dismissed.

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FULL BENCH.

KHALIL-UD-DIN AHMAD

versus

BANNI BIBI.*

Registration Act (XVI of 1908), sections 31, 32, 52, and 87—Presentation by a person who was not an agent of the executant—Registration invalid—Procedure—Invalid presentation not a question of.

A mortgage deed was presented for registration by the husband of a *pardanashin* lady, who was admittedly not a duly authorized agent, to the sub-registrar of Tahsil Bareilly. The sub-registrar sent the document to the departmental sub-registrar for its attestation by the executant. The departmental sub-registrar went to the house of the lady and she admitted execution before him. The document was then sent back to the sub-registrar of Tahsil Bareilly who registered it. *Held* that as the husband of the lady had no authority to present the document for registration and as the departmental sub-registrar had no authority to receive the document for registration, there was no valid presentation of the deed, and it had not been validly registered.

FIRST APPEAL from a decree of Babu Baij Nath Das, Officiating Subordinate Judge of Bareilly.

This was a suit on foot of a mortgage bond for Rs. 7,000, executed by Musammat Banni Bibi, on the 11th of July, 1893, in favour of Niaz Bibi. Niaz Bibi transferred her rights to the plaintiff-appellant, Khalil-ud-din, by a sale deed bearing date the 7th November, 1896. The bond was taken to the office of the sub-registrar of pargana and district Bareilly by Muiz-ud-din, husband of Musammat Banni Bibi. He endorsed at the back that "the document was presented by Muiz-ud-din on Wednesday the 12th, July 1893," that "he stated that the Musammat was a *pardanashin* lady and that the document may be attested from the Musammat at her residence by means of a commission", and that "as the Musammat lived within the local limits of the Municipality the document may be sent to the departmental sub-registrar of Bareilly for attestation". The document was taken to the residence of the lady the same evening by the departmental sub-registrar

who endorsed on it that the document had been attested and that the papers be sent back to the sub-registrar of the Tahsil Bareilly. It was admitted that Muiz-ud-din held no power of attorney from Musammat Banni Bibi. The defence to the suit was *inter alia* that the document had not been legally registered as it had not been presented for registration by any authorized person within the meaning of section 32 of the Registration Act. The Subordinate Judge held that the document had not been duly registered and dismissed the suit. The plaintiff came in appeal to the High Court.

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S. C. Banerji (Ibn-Ahmad, with him), for the appellant

Referred to sections 31, 32, 33, of the Registration Act XVI of 1908. Section 32 provided that except in cases governed by sections 31 and 89, every document was to be presented in a particular manner. So in cases coming within section 31 it was not necessary to present the document in person. The maxim *qui facit per alium facit per se* applied, and an agent could present the document. So when an application was to be made under section 31, any agent could make it.

[BANERJI, J.—Do not the words there relate only to presentation? Section 31 dealt with presentation only and the acceptance of the document. So if the registrar went to the house and accepted the document, section 31 won't come in at all.]

The question was if 'presentation' meant the physical act of handing in the document or of tendering the document for registration.

• There were three Privy Council cases on the point.

Sah Mukhan Lal Pandya v. Sah Koondun Lal, [1875] 2 I. A., 210. S. C. 24 W. R., 75.

The observations in this case were explained in the next case of

Mohammed Ewas v. Birj Lal, [1877] 4 I. A. 166. S. C. I. L. R., 1 All., 465.

There the vendors lived at different places, they did not come together for registration and the question was if they could appear separately and register the document. Their Lordships held that it could be so registered,

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[CHAMIER, J.—You put the crucial section in the case on the footing of sections 19, 21, and 36 of the old Act.]

Yes.

[CHAMIER, J.—There are two distinct things—presentation and registration.]

It is possible to make a distinction, viz., that presentation is the act of the party and registration that of the officer, but presentation was for registration and the act legally operative and indispensable was that of registration.

[RICHARDS, C. J.—Unless there was some special significance in the physical act of handing in, it could not be said that presenting was one thing and registering another.]

The last Privy Council case was

Mujib-un-nisa v. Abdur Rahim, [1900] 1 L. R., 23 All., 233

The principal was dead when the document was presented. There was no invocation of the registrar by anyone having anything to do with the deed. Here it was different. The deed was registered at the instance of the lady before whom the document was taken, who identified it, admitted execution and who asked for its registration. The decision in 23 All., did not affect the present case. With the object of satisfying the sub-registrar that there was special cause within the meaning of section 31, the husband may have taken over and shown the document. If he handed it over, that was an act without legal effect, and should not be taken into account. Strictly speaking the sub-registrar should have returned the document. Instead of that he kept it with him and took it to the lady. The error of the sub-registrar was nothing more than a defect in procedure.

[RICHARDS, C. J.—The question is—Was the handing in by the husband fatal? or was it as if he had given it to a friend asking him to bring it round the next day for registration.]

[TUDBALL, J.—The sub-registrar was here invoked by a party having a relation to the deed.]

[RICHARDS, C. J.—Their Lordships could not mean that if the registrar were wrongly invoked at first he could not be rightly invoked again.]

All that the law requires is that the document should be before the sub-registrar and he is to be requested to accept for registration.

The cases in this court were :

- Ikkal Begum v. Sham Sunder*, [1882] 1 L. R., 4 All., 384,
• following another in the same volume.

Har Sahai v. Chunni Kuar, [1882] 1 L. R., 4 All., 14.

The case in

Hardei v. Ram Lal, [1 L. R., 1889] 1 L. R., 11 All., 319, F. B.,

was considered by the Privy Council in 23 All., and the actual decision must be considered to be overruled by it.

[TUDBALL, J.—Did the registrar ask the lady in the case if she wished the document registered ?]

That is the evidence.

[BANERJI, J.—What you say is if you wipe out what happened the previous day there was presentation the subsequent day.]

That is my submission.

Other cases were

Wilaiti Begam v. Fazal Husain Khan, [1912] 9 A. L. J. R., 148.

Nathu Mal v. Abdul Wahid Khan, [1912] 9 A. L. J. R., 362.

It was admitted that the *karinda* presenting did not possess the required power of attorney. In another case—

- Ram Chandra Das v. Farzand Ali Khan*, [1912] 9 A. L. J. R., 188,
there was no evidence to show that he did not. The only difference between *Nathu Mal's* case and this was that there the mortgagor was present whereas here the lady was not.
• But what happened in the presence of the lady had to be taken into consideration.

In *Jambu Prasad v. Aftab Ali Khan*, [1912] 9 A. L. J. R., 420,
it was not proved that the executants were present when the registrar took in the deed and registered it.

Another case was

Ishri Prasad v. Baijnath, [1906] 1 L. R., 28 All., 707,
where it was held that neither section 31 nor 89 applied. When it is a case under section 31, the law does not require that it is any particular kind of agent who should invoke the registrar.

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[RICHARDS C. J. This case does come under section 31 and section 32 does not apply to anything coming under that section. The lady was there knowing that the registrar was there to register. I cannot see any difference between asking for registration and assenting to registration.]

The observations of Lord HALSBURY in

Quinn v. Leathem, [1901] A. C., 495, at 506,

showed that the observations of the Privy Council in 23 All., were to be restricted to the facts of that particular case.

If presentation by the husband was at all a presentation, it should be ignored. "Present" is used in section 32 in a technical sense, and is not merely equivalent to handing in; what happened subsequently satisfied the requirements of law, and if the sub-registrar thought that the husband had presented the document and endorsed it to that effect, it was merely a defect in his procedure and could be cured by section 87.

The cases in 4 All. show that the mortgagor is estopped from disputing the validity of the registration.

B. E. O'Connor (J. M. Banerji with him), for the respondent.

The facts were not disputed. The two processes were performed separately. The husband presented the document to the registrar, who endorsed that fact on it, and then he went to the lady's house to register it.

[RICHARDS, C. J.—Was the lady an assenting party to the registration with full knowledge of what was being done?]

That would be the effect of it. But the question was if in the present view of the law the fact that it was not properly presented was not fatal to it. There were two essential processes incidental to registration, (1) Presentation and there had to be a record made of it; (2) the registrar having been put in motion by a proper presentation he proceeds to the formal registration.

Going back to the history of registration we have Act XX of 1866, consolidating the law of registration. All Acts since follow each other closely—those in 1871, 1877 and 1908—both in parts and in the language used. The endorsement of presentation is mentioned in all these Acts, and the provi-

sions are not novel, the conditions are looked upon as essential.

Section 31 is in part V and section 32 in part VI of the Act. In part V are grouped together all the provisions relating to the place of registration, and in part VI there are put together provisions which relate to the mode of registration, and section 31 relates to the place of it. Part V itself is in two parts. The first says that only in a proper office can a document be registered. But there is a provision in section 33 itself for cases when the registrar goes to the abode of a person wishing to present a document for registration. In the second we have the procedure the registrar has to follow.

As between first para. of section 31 and the first part of 32, there is no conflict. In the second part we have the persons who are to make the presentation. There are 3 classes of persons. Sections 31 and 32 are not mutually exclusive.

[RICHARDS, C. J.—When the husband went to the registrar, it was not under section 31.]

That section contemplates that nothing in the shape of presentation is to take place at the office, if the registrar goes to the abode of person wishing to register.

[BANERJI, J.—Is there any provision apart from section 33 providing for the registrar to go to the abode of the executant?]

[TUDBALL, J.—Section 31 only authorises the registrar to do at the house what he ought to do at the office.]

It does not alter the formalities.

[BANERJI, J.—Section 89 is linked with section 31. The former requires no presentation. Where the latter applies is there to be any presentation by the person to whom the registrar goes?]

That would be assuming that he went there for the two-fold purpose of registering and accepting presentation.

[RICHARDS, C. J.—He did with that idea.]

We had to see what he did.

[RICHARDS, C. J.—Presentation by the husband must be conceded to be void. But was the fact of the husband presenting so fatal that nothing could cure the defect and the deed became incapable of being subsequently registered? The next

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question was, if what happened subsequently did not amount to a presentation. We have your admission that the lady knew what she was doing when she assented to the registration.]

[BANERJI, J.—If a presentation is wrongly made, can it not be put right again?]

Yes, that was possible; but the procedure provided must be followed, and evidence adduced must show that the proper person was the presenting party.

[RICHARDS, C. J.—Is it essential that the registrar must accept it from a particular person?]

It has to be endorsed to that effect.

[TUDBALL, J.—The endorsement was not conclusive.]

No, evidence could be taken, but here it was the 'right endorsement. It was presented by the husband. Supposing what the husband did were wiped out—what could the legislature have meant by providing in section 52 that the day, hour, etc., were to be recorded and the signature of the person taken. That was to meet the very class of cases where a person presented a document which was to be subsequently registered.

[RICHARDS, C. J., referred to the concluding portion of section 52.]

In conjunction with that we had to look at section 32 and see how imperative the language became.

[CHAMIER, J.—Did section 32 apply to any case to which section 31 applied?]

First part of section 32 would apply; the question was about the second part. If section 32 was to be excluded, it would be necessary for executant himself to offer the document for registration. That was not my contention. I only refer to the difficulty which would arise if the two were held to be mutually exclusive.

What the husband did could not be treated as a nullity because the document was not so endorsed, and the registrar never endorsed it as presented by the lady.

[RICHARDS, C. J.—Suppose the endorsement was erroneous.]

There would be an endorsement to that effect,

[RICHARDS, C. J.—The one reason why the registration was invalid was because the husband presented it to the registrar?]

Yes.

[RICHARDS, C. J.—It is inequitable to say that the presentation by the husband was invalid and then to say that it was the only presentation.]

In the one case there is a presentation which is not justified, and in the other nothing till the registrar goes to the lady, when there is nothing which could be pointed to as presentation, as distinguished from something which was registration.

[RICHARDS, C. J.—Could you define what is 'presentation' under section 32. My definition would be "the communication to the registrar of a desire to have a document registered by a person entitled to have it registered accompanied by the presence of the document".]

There is something essential in the physical act of handing it in, the law lays so much stress on it. It cannot be said that it is a mere formality. The endorsement is essential.

[RICHARDS, C. J.—Would you say that if there was no endorsement that would vitiate the registration? If you wipe out what the husband did, the evidence in the case is that the requirements of law were satisfied.]

If the definition of the Chief Justice were embodied in the law, the desire would still have to proceed from the proper person.

[RICHARDS, C. J.—Then it is complete here.]

• Yes, if you wipe out what the husband did.

In the case in 23 All., presentation was held to be bad, the person presenting had no authority.

[RICHARDS, C. J.—Do you mean they were holding presentation to be something distinct from registration? Won't it be just as fatal if you put in 'registration' for 'presentation'.]

[TUDBALL, J.—If the registrar had done his duty and asked the husband if he had authority to register the document, he would have known that he had none and he must have known that it was no presentation.]

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That was so.

The Privy Council lay stress in 23 All. on section 32, a person not authorised cannot present. If it were merely a matter of procedure it would only authorise the registrar to go to the place asked and register the deed. There is a regular series of steps to be followed. He must act in pursuance of the Act. Failure to do so is not merely a defect of procedure. If it was not necessary that presentation should be by the right person, it would not be necessary to specify the persons who could do it. Anybody might do it then. What was done could not be wiped off.

The definition given by the Chief Justice did not clash with this position.

[RICHARDS, C. J.—Yes, it did. I said “a desire to have it registered.” Communication of that desire at any time before registration is sufficient, and anything going before may be wiped out completely.]

The case in 23 All. was authority for the proposition that registration following on a bad presentation was illegal. Presentation was not defined anywhere but see

Bartlett v. Holmes, [1853] 22. L. J. C. P., N. S., 182, 185.

Besides the person who actually went to the lady's house was only a commissioner and the document could not be presented to him. He acted merely as a post office. The lady never came before the sub-registrar at all.

Satish Chandra Banerji, in reply—(on the last point).

This plea was never taken before. In any case it was a mistake of the sub-registrar and was merely a defect in procedure and could be remedied by section 87.

[TUDBALL, J.—That would be getting round the case in 23 All.]

The district registrar had sent the document to the sub-registrar in the case in

Ram Chander Das v. Farzand Ali Khan, [1912] 9 A. L. J. R., 188, and there it was held to be duly registered.

[BANERJI, J.—There the document had been originally properly presented to the sub-registrar.]

If the sub-registrar sent some one else here it was his *bona fide* mistake; why should the parties suffer?

[BANERJI, J.—Presentation is the act of the parties and not of the sub-registrar according to the Privy Council.]

[TUDBALL, J.—Absence of the necessary party at presentation is not a defect in procedure according to the Privy Council.]

Then the question of estoppel remained.

[RICHARDS, C. J.—I do not think in a case like this, you could say there was any estoppel at all.]

The following judgments were delivered :—

RICHARDS, C. J.—This appeal arises out of a suit brought on foot of a mortgage, dated the 11th of July, 1893. Various defences were pleaded, and amongst other things execution and consideration were denied. The court below has found nearly all the issues in favour of the plaintiff. It has found that the bond was duly executed by Musammat Banni Bibi, the mortgagor, and that the consideration was duly paid to her. The court, however, somewhat reluctantly found that the bond had not been duly registered. This question of registration was the question which came before a Bench of this Court. It appears that on the day on which the mortgage purports to have been registered, the husband of Musammat Banni Bibi made an application to the sub-registrar of Bareilly tahsil. The actual application is not before us but there is endorsed on the bond the following note :—

“ This document was presented by Muiz-ud-din Ahmad on Wednesday, the 12th July, 1893, between 8 and 9 A. M., in the office of the sub-registrar of parganah and district Bareilly. He stated that Musammat Banni Bibi, the executant of the document, was a *pardanashin* lady. The document may be attested from the Musammat at her residence by means of a commission. As the Musammat above-named resides within the local limits of the Municipality, this document may be sent to the departmental sub-registrar of Bareilly for attestation (Sd.) Wasi-ud-din, sub-registrar. (Sd.) Muiz-ud-din Ahmad, the person presenting this document, in autograph.”

It next appears that the departmental sub-registrar of Bareilly went the same day to the lady's house. The lady was duly identified and she admitted execution of the deed.

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The money was paid over and the departmental sub-registrar sent the document to the sub-registrar of tahsil Bareilly, who registered the same. It further appears from the endorsement upon the bond that the person who "presented" the document for registration to the sub-registrar of tahsil Bareilly was the husband. It is clear that the sub-registrar understood the husband to be the person who was "presenting" the document to him for registration. In the court below and in this court it was admitted that when Muiz-ud-din Ahmad, the husband, "presented" the document for registration, he was not authorised in the manner prescribed by sections 32 and 33 of the Registration Act of 1877, which was then in force. It was, however, strongly contended that what subsequently happened at the residence of the lady amounted to a good "presentation" within the meaning of the Act and that the document ought therefore to be considered as having been duly registered.

At the first hearing of the appeal in this Court it was never pointed out that the gentleman who attended at the residence of the lady was not the same sub-registrar who had in the first place received the document from her husband; and the question which the court considered it had before it was whether or not the lady having admitted the execution and communicated to an officer competent to accept and register the document her desire to have it registered, the document was not sufficiently "presented" within the meaning of the Act. The Bench before whom the appeal came considered that it was desirable that the question should be decided by a larger Bench, and the case was accordingly referred to the Bench as at present constituted.

The arguments in the first instance entirely proceeded upon the basis that the departmental sub-registrar was entitled to receive the document for registration if in fact it had been duly "presented" to him. It has now at the very close of the arguments been pointed out, that the departmental sub-registrar had no such authority, and the question which it was intended to have decided by this Bench does not really arise. It seems to me that we have now only to decide whether or not the "presentation" which was

made by the husband can, from any point of view, be regarded as a good "presentation," and secondly, whether the fact, that the registrar received the deed for registration from an unauthorised person, is merely a defect of procedure which might be disregarded under the provisions of section 87. It seems to me that the "presentation" by Muiz-ud-din Ahmad was a complete nullity. He had no authority whatever to present the document for registration, and in my opinion this question is completely covered by the ruling of their Lordships of the Privy Council in the case of *Mujib-un-nisa v. Abdur Rahim* (1). I am also of opinion that under no circumstances can, what subsequently happened at the house, be deemed a good presentation, because the gentleman who attended at the house had no authority to receive the document for registration. His authority was confined to ascertaining that the document had been duly executed, that is to say, to examine the executant under the provisions of section 38. I would dismiss the appeal.

KNOX, J.—I concur and have nothing further to add.

BANERJI, J.—I also agree in the conclusion at which the learned Chief Justice has arrived. In the case decided by the Privy Council, namely, the case of *Mujib-un-nisa v. Abdur Rahim*, their Lordships observed "It is clear that the power and jurisdiction of the registrar only come into play when he is invoked by some person having a direct relation to the deed. It is for those persons to consider whether they will or will not give to the deed the efficacy conferred by registration. The registrar could not be held to exercise the jurisdiction conferred on him if, hearing of the execution of a deed; he got possession of it and registered it, and the same objection applies to his proceeding at the instigation of a third party, who might be a busybody." In the present case the document was not presented for registration by a person having a direct relation to the deed, and the subsequent admission of execution by the executant was before an officer who had no jurisdiction to accept the document for registration. Therefore there was no presentation to a sub-registrar having jurisdiction, and the registration of the document must, according to the ruling of the Privy

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Council, be held to be invalid. I also would dismiss the appeal.

TUDBALL, J.—I fully concur and have nothing further to add.

CHAMIER, J.—I agree with the order proposed by the learned Chief Justice. It appears to me that there was neither, in fact nor in law any "presentation" of this document by any qualified person to any person authorised to receive it for registration.

BY THE COURT.—The order of the Court is that the appeal is dismissed but without costs. The objection raised by the respondent as to costs is also dismissed without costs.

S. M.

Appeal dismissed.

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PRIVY COUNCIL.

BUKSH ELAHI

versus

DURLAV CHANDRA KAR.*

Contract—Statute applicable thereto—Variation—General considerations—Administrative rules—Revenue sale—Bengal land—Revenue Sales Act (XI of 1859), sections 2 and 3—Bengal Act VII of 1868—Tenure rent—Revenue—Annual jumma—Date of payment fixed by kabuliyat—The same fixed by Board of Revenue—Ordinary date of payment—Date of "the settlement"—Arrears—Latest date of payment—Rule 7 of Part III, clause 16 of Survey and Settlement Manual—Sale before the latest date of payment of arrears.

There can be no variation of a contract and the statutory provisions applicable thereto by reason of general considerations or administrative rules which have not the sanction of statute.

By virtue of section 3 of Act XI of 1859, the Board of Revenue published in 1871, a notification fixing "the 28th June of each respective year as the latest date of payment of rents of all description of tenures" in a *khas mahal*. By a *kabuliyat* executed in 1874, by a tenant of a holding in the *khas mahal* it was stipulated that he "shall pay the said *jumma* in the Collectorate within the 28th day of June every year". On March 16th, 1903, the holding was sold for arrears of revenue for 1902 ;

Held, that (1) under Act XI of 1859, section 2, which applied, the rent payable under the *kabuliyat*, on June 28th, 1902, was not in arrear till the 1st of July, 1902, on which date by virtue of the provisions of the Bengal Act VII of 1868, it must be "considered as an arrear of revenue";

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(2) Whatever might be the ordinary date of payment, or secondly, whatever might be the date when "the settlement" was made, or thirdly, whatever be the provisions of the survey and settlement manual, it was not legitimate, by reason of any one or all of those things, to vary the actual date of payment in the *kabuliyat*, which was the 28th June, or the actual date when a past due payment should be considered as an arrear, which was by Act XI of 1859, the 1st July, 1902;

(3) Rule 7 of Part III, clause 16, of the Survey and Settlement Manual did not apply;

(4) The notification of 1871 must, having regard to section 3 of Act XI of 1859, which authorised it, be applied to the holding in question as fixing the 28th June, 1903, as the date on which, if arrears were not paid, the holding could be sold;

(5) The sale on March 16, 1903, must be set aside.

Balkishen Das v. Simpson, L. R., 25, I. A., 151; S. C., I. L. R., 25 Cal., 833, referred to

TWO CONSOLIDATED APPEALS from two decrees of the High Court at Calcutta, which set aside two decrees of the Subordinate Judge, second court of Zilla 24-Pergunnahs in Bengal.

The question for determination was whether the sale of two plots of land for alleged arrears of revenue, was liable to be set aside. The plots or holdings in question were situate within the Government *khas mahal* Estate Panchannogram and were permanently settled.

The Government published the following notice, dated the 6th October, 1871, in the *Calcutta Gazette* of the 11th October, 1871:

Notice is hereby given that under the provisions of section 3, Act XI of 1859, the Board of Revenue at Calcutta has determined and fixed on the 28th June of each respective year as the latest date of payment of the rents of all descriptions of tenures in Khas Mahal Panchannogram; in default of which payment on or previous to that date, tenures in arrears in that *mahal* will be sold at public auction to the highest bidder under the provisions of Act VII (B. C.) of 1868.

On the 18th February, 1874, one Bhagaban Chandra Banerji, the then tenure holder of the holdings, executed

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two *kabuliyats* in identical terms in favour of the Government. The material part of it was as follows :—

"I accept Rs. 14-0-11 as the annual *jumma* of 12 bighas, 18 cottahs, 4 chittacks of land, measured and specified above I shall pay the said *jumma* in the Collectorate within the 28th day of June every year. If I do not pay, it shall be realised by the Government according to law and to that I shall not be able to raise any objection whatever. To this effect, I, of my own will and accord, execute this *kabuliyat*."

On the 27th of March, 1902, a son of Bhagban Chandra Banerji sold the said two holdings to the appellant and put him in possession thereof.

On the 16th of March, 1903, the two holdings were put up for sale, on account of an alleged default in payment of Government revenue for the June instalment of 1902, and were sold to the respondent.

The two suits out of which the present appeals have arisen were then instituted. On the 19th January, 1904, the appellant brought suit No. 17 of 1904, for the purpose of getting the said sale set aside, and for other relief. On the 8th of April, the respondent filed suit No. 46 of 1904, against the appellant, to obtain possession of the two holdings, which he alleged that he had purchased at the said sale held on the 16th of March, 1903. The two suits were tried together. The Subordinate Judge held that the sale in question was invalid in law and should be set aside.

The respondent appealed in both suits. The High Court disagreed with the Subordinate Judge and decreed the appeals.

The appellant, therefore, appealed to His Majesty in Council.

Sir Robert Finlay, K. C., and *G. E. A. Ross*, for the appellant :

The rent is payable on the 28th June every year. It is a date fixed by contract between the parties.

[MR. AMEER ALI : There are no *kists* in this case.]

There are none. The revenue is payable annually. The Board of Revenue fixes the dates on which arrears due are payable : The Bengal Land Revenue Sales Act (Bengal Act VII of 1868), section 11, as amended by Bengal Act II of 1871, and the Bengal Land Revenue Sales Act (XI of 1859);

section 3. Rent in arrear is the rent which has not been paid on the date when it is due.

[SIR JOHN EDGE referred to section 2 of Act XI of 1859, for a definition of 'arrear of revenue'.]

That section means that whenever the payment of rent falls due in any month, even when the rent is not payable monthly, it becomes rent in arrear on the first of the following month. It is a section of general application, and is not applied as the High Court has held, only to cases where the rent is payable monthly. If section 2 were not of general application, the object of the Act, as given in the Preamble of the Act, would be defeated. Consequently the rent here was in arrear on the 1st July, 1902, and the holdings were not liable to be sold before the 28th June, 1903, as June 28th is the last day of payment of arrear of rent. Again, whichever way section 2 runs, in this case the rent was not in arrear till June 28th, 1902, had passed, and the last day of payment of such arrear was June 28th, 1903, on which date the holdings were liable to be sold :

Act II of 1859, section 3,

But the sale took place on March 16th, 1903. The sale is, therefore, without jurisdiction and must be set aside :

Balkishen Daz v. Simpson, [1898] L. R., 25 I. A., 151 ; S. C., I. L. R., 25 Cal., 833,

Harkhoon Singh v. Bunsidhur Singh, [1898] I. L. R., 25 Cal., 876.

[MR. AMEER ALI : The date of payment is 'within' June 28th.]

Yes. It would mean 'on or before' June 28th.

• Rule 7 of Part III, clause 16, of the Survey and Settlement Manual has nothing to do in this case with the date of payment, which is fixed by contract.

[SIR JOHN EDGE : The Board of Revenue could not alter the date fixed by the *kabuliyat*.]

It would be very hard, if that were so. The estate in that case would be liable to be sold immediately. Act XI of 1859 has intended that there should be a further notice after the rent becomes due, and for this reason the legislature has

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under section 3 thereof, allowed some time before authorising a sale.

[Mr. AMEER ALI. The basis of the argument of the High Court is that the rent was in arrears on the 28th June, 1902.]

Yes, but it is submitted that that view is erroneous.

DeGruyther, K. C., and Kenworthy Brown, for the respondent.

Act XI of 1859 applies to estates paying Government revenue and not to a *Khas Mahal*, which does not pay Government revenue. A *Khas Mahal* pays rent, and the tenure here is not, therefore, subject to Act XI of 1859, Bengal Act VII of 1868 is the Act applicable to this case, and section 11 of that Act requires the Board of Revenue to fix 'the latest day of payment'. The notification of 1871 is, therefore, issued, fixing June 28th, as the latest day of payment, and if the rent is not paid on that date, it is in arrear. For practical purposes "in arrear" means what is due and unpaid. The appellant is a tenant and the time of payment of rent in his case is governed by the Bengal Rent Act (XI of 1859), section 20, which was in force when the settlement was made in 1864, or by the repealing Act, the Bengal Tenancy Act (VIII of 1885), sections 53 and 54, under either of which Acts the rent must be paid by 'sunset' on June 28th. Other incidents of the tenure created by the *kabuliyat* are governed by the Bengal Tenancy Act, and it is submitted that the time of the payment of the rent on June 28th, the date fixed by the *kabuliyat*, must also be governed by the same Act. At the time of fixing the date in the *kabuliyat* the settlement officer must have had before his mind section 11 of Bengal Act VII of 1868, and the notification of 1871. The word used in the *kabuliyat* is 'within' June 28th, and not 'on or before'. It simply means that the appellant is allowed time up to June 28th to pay the rent, though the rent might be due in February, the month of the settlement, or April, the beginning of the financial year :

Rule 7 of Part III, clause 16 of the Survey and Settlement Manual.

If the rent is not paid by sunset on June 28th, the tenure at once becomes saleable.

It is contended that the rent was in arrear on July 1st, and the tenant had time to pay it till June 28th of the following year. The result of such a contention is that the rent might remain unpaid for 2 years. The Subordinate Judge has not based his argument on the *kabuliyat*, but has incorporated section 2 of Act XI 1859 in it. But that section does not apply to tenures. Moreover, it applies to cases where the revenue is payable in a particular month, but not to cases where the rent is payable on a particular date of a month. In the latter class of cases, by the ordinary rule of construction of a contract, the rent does become payable on the date fixed. Again the words 'in the manner prescribed in section 3 of Act II of 1859,' in section 11 of Bengal Act, VII of 1868, do not incorporate the former section into the latter. Those words simply mean that the notification there referred to shall be published in a particular manner prescribed in section 3 of Act XI of 1859. Reference was also made to

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Sections 6 and 19 of Act XI of 1859 ;

Bengal Act VIII of 1868, s. 1, meanings of 'proprietor,' 'revenue' and 'tenure' ;

and the

Revenue and Patni Sales Manual

The cases of

Harkhoo Singh v. Bansidhar Singh, [1898] 1 L. R., 25 Cal., 876

and

Mahomed Jan v. Ganga Bishun Singh, [1910] L. R., 38 I. A. 80, were distinguished.

Ross, in reply, referred to section 30 of Bengal Act VII of 1868, and submitted that section 11 of that Act should be read together with sections 2 and 3 of Act XI of 1859.

The judgment of their Lordships was delivered by

LORD SHAW.—These are consolidated appeals from judgments and decrees of the High Court at Calcutta, which set aside two decrees of the Subordinate Judge in the second court of 24 Pergunnahs, in Bengal. The question for determination by the Board is whether a certain sale of holdings for arrears of revenue, made to the respondent on the 16th March, 1903, should be set aside.

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On the 27th March, 1902, the appellant purchased these holdings for Rs. 16,000 from a son of Bhagaban Chandra Banerji. By the *kabuliyat* executed in the year 1874 by Bhagaban, who was thus the appellant's predecessor in title, it was stipulated as follows :—"I shall pay the said *jumma* in the Collectorate within the 28th day of June every year." The holdings were Government tenures in Dihi Panchanagram in the district of twenty-four Pergunnahs, and it is not disputed that such tenures came under the Act XI of 1859 by virtue of the provisions of Act VII of 1868. By section 2 of the former Act an arrear of revenue was described thus :—

"If the whole or a portion of *kist* or instalment of any month of the era, according to which the settlement and *kistbundi* of any *mahal* have been regulated, be unpaid on the first of the following month of such era, the sum so remaining unpaid shall be considered as an arrear of revenue."

It seems accordingly hardly to admit of dispute that, if this section applied, the rent payable under the *kabuliyat* on the 28th June, 1902, was not in arrear till the 1st of July thereafter.

Statute having thus made clear what was to be considered an arrear of revenue, and at what date a past due payment was to be "considered as an arrear of revenue", namely, on the first of the month following that in which the payment fell due, the further question is this, *viz.* :—Was this sale conducted in accordance with the procedure prescribed by statute for the sales of property in respect of unpaid arrears of revenue?

While, as stated, it was admitted that these tenures were brought under the Act of 1859 by the Statute of 1868, it was nevertheless contended that there was some distinction to be made with reference to procedure and with reference to what constituted "arrears." The contention is important and was ably presented, but, in their Lordships' opinion, it is without foundation. The Act of 1868 above referred to extends the word "revenue" so as to include "every sum annually paid to Government by the proprietor of any estate or tenure in respect thereof". As to the attempt to differentiate procedure under the two statutes, the answer to that seems sufficiently

contained in section 30 of the later Act, which provides that it shall be read with, and taken as part of, the former. The date when a past due payment was to be considered arrears having accordingly been settled by section 2 of the Act of 1859, as quoted, their Lordships cannot agree with the judgment of the High Court, which introduces a reference to "the settlement" having been made on 18th February. Therefore, say the learned Judges :—

"In the case of an ordinary contract of lease, the annual *jumma* would be payable on 18th February in each successive year; but under Rule 7 of Part III, clause 16, of the Survey and Settlement Manual, a settlement of revenue should ordinarily take effect from the beginning of the financial year next after that in which the proceedings of the settlement officer have been completed. If that rule be applied, the settlement dates from 1st April, 1874, and the *jumma* would ordinarily be payable on 1st April each year."

The statements and considerations here given do not appear to their Lordships to bear upon the present case. Whatever might be the ordinary date of payment, or secondly, whatever might be the date when "the settlement" is made, or thirdly, whatever be the provisions of the Survey and Settlement Manual, it does not appear to their Lordships legitimate; by reason of any one or all of these things, to vary the actual date of payment in the *kabuliyat* in the present case, which is the 28th June, or the actual date when a past due payment should be considered as an arrear, which is by the Statute of 1859 the first July, 1902. No variation of the contract of parties and the statutory provisions applicable thereto is possible by reason of general considerations or administrative rules which have not the sanction of Indian Statute. In the words of Lord WATSON, in *Balkishen Das v. Simpson*(¹), referring to the Act of 1859 :—

"The Act does not sanction, and by plain implication forbids, the sale of any estate which is not at the time in arrear of Government revenue. The whole clauses of the Act of 1859, in so far as these relate to sales or to their challenge at the instance of the proprietor, as well as the provisions of section 2 of Bengal Act VII of 1868, are framed upon the express footing that they are to be applicable to the sale of estates which are in arrear of duty."

(1) [1898] 25 L. R., I. A., 151.

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The date, when by Statute accordingly this revenue was considered in arrear, was the 1st July, 1902. At what date was default made in paying that arrear of revenue, so as to entitle a sale of the estate to be made? This, which appears to their Lordships to be the real question in the case, is clearly answered by the Act of 1859 itself and by the notification which followed thereon. By section 3 of the Act, "The Board of Revenue at Calcutta shall determine upon what dates all arrears of revenue, and all demands which by the Regulations and Acts in force are directed to be realised in the same manner as arrears of revenue, shall be paid up in each district under their jurisdiction, in default of which payment the estates in arrear in those districts, except as hereinafter provided, shall be sold at public auction to the highest bidder." In compliance with this section, the Board of Revenue, on the 6th October, 1871, made and duly published a notification that it—

"has determined and fixed the 28th June of each respective year as the latest date of payment of the rents of all description of tenures in Khas Mahal Panchannagram, in default of which payment on or previous to that date tenures in arrears in that Mahal will be sold at public auction to the highest bidder."

Bearing in mind that the whole provisions with regard to sales are, in the language of Lord WATSON, "framed upon the express footing that they are to be applicable to the sale of estates which are in arrear of duty", and that this tenure could not be considered in arrear until the 1st July, 1902, it appears fairly clear that the 28th June, 1903, is the first date under the proclamation and the Statute when there has arisen such a default as would enable that "tenure in arrears" to be sold. It so happens that the payment in the present case is not a monthly, but an annual payment, and it further happens that the payment fell to be made on the 28th June, 1902. The Statute having by plain implication forbidden the estate to be considered in arrear until the 1st July, it appears to follow that the date fixed as that on which tenures in arrear will be sold must be the succeeding 28th June, namely, in the year 1903. This estate, however, was sold in the previous month of March, and their Lordships agree with the view of the Subordinate Judge

in thinking that the sale is accordingly invalid. In the language of the learned Judge—

“ The Board of Revenue are required, under section 3 of the Act, to determine on what date *arrears of revenue* shall be paid up, in default of which payment the estates in arrear shall be sold at public auction.”

Their Lordships agree with the view that the notification must, having regard to this section of the Statute which authorised it, be applied to the present estate as fixing the 28th June, 1903, as the date on which, if the arrears are not paid up, the estate can be sold. If, in cases such as the present, this holds up the power of sale until nearly a year's revenue stands in arrear, that matter, including the question whether more than one date for payment of arrears should be set up as periods of default, is one for the consideration of the Legislature and the Board of Revenue.

Their Lordships will humbly advise His Majesty that the Appeals should be allowed, the judgments and decrees of the High Court reversed, and those of the Subordinate Judge restored, the costs of the suit and of the appeal being borne by the respondent.

W. W. Box & Co., Solicitors for the appellant.

The Solicitor, India Office, Solicitor for the respondent.

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Appeal allowed.

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in thinking that the sale is accordingly invalid. In the language of the learned Judge—

“The Board of Revenue are required, under section 3 of the Act, to determine on what date *arrears of revenue* shall be paid up, in default of which payment the estates in arrear shall be sold at public auction.”

Their Lordships agree with the view that the notification must, having regard to this section of the Statute which authorised it, be applied to the present estate as fixing the 28th June, 1903, as the date on which, if the arrears are not paid up, the estate can be sold. If, in cases such as the present, this holds up the power of sale until nearly a year's revenue stands in arrear, that matter, including the question whether more than one date for payment of arrears should be set up as periods of default, is one for the consideration of the Legislature and the Board of Revenue.

Their Lordships will humbly advise His Majesty that the Appeals should be allowed, the judgments and decrees of the High Court reversed, and those of the Subordinate Judge restored, the costs of the suit and of the appeal being borne by the respondent.

W. W. Box & Co., Solicitors for the appellant.

The Solicitor, India Office, Solicitor for the respondent.

J. M. P.

Appeal allowed.

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September, 3.

RAFIQ, J.

RAM PRASAD AND ANOTHER

versus

KING-EMPEROR.*

Penal Code—(Act XLV of 1860), section 199—Prosecution under—Declaration must be admissible in evidence—Court authority to receive it.

A declaration before it can be made the foundation of a prosecution under section 199 of the Indian Penal Code, must be one which is admissible in evidence, and which the court before whom it is filed, is bound or authorised by law to receive in evidence. The fact that there is no prohibition against the reception of such declaration in evidence does not render it admissible or make the declarant amenable to the provisions of section 199 of the Indian Penal Code.

CRIMINAL REVISION from an order of H. Bomford, Esq., District Magistrate of Cawnpore.

C. Dillon (*W. Wallach* with him), for the applicants.

Satya Chandra Mukerji, for the opposite parties.

The following judgment was delivered by

Rafiq, J.

RAFIQ, J.—This is an application in revision, praying that the order of the District Magistrate of Cawnpore, dated the 30th of July, 1912, sanctioning the prosecution of the applicants under section 199 of the Indian Penal Code be set aside. The circumstances which led to the grant of the sanction are as follows :—On the 19th of February, 1912, three complaints were filed in the court of the City Magistrate of Cawnpore, namely, (1) *Musannnat Rupia v. Ram Dial and Ram Sahai*, (2) *Ram Dial v. Gauri Shanker*, (3) *Ram Sahai v. Gauri Shanker*. The learned City Magistrate transferred the three complaints to a Bench of Honorary Magistrates, composed of Nawab Khakan Husain and Pandit Kundan Lal for disposal. There were several postponements during the trial of the three cases, and on the 21st of May, 1912, charge sheets were framed. On the 31st of May, 1912, three applications were filed in the court of District Magistrate of Cawnpore, by Ram Sahai and Ram Dial, for the transfer of the three cases from the Bench of the Honorary Magistrates to some other court.

* Cr. Rev. No. 581 of 1912.

The applicants for transfer made certain allegations against the Honorary Magistrates. The three applications were accompanied by three declarations, the latter being made by Ram Prasad, Puttan Lal and Ala Bakhsh. The three declarations were not sworn to before any officer of a court. The District Magistrate called upon the Honorary Magistrates for an explanation which was submitted on the 26th of June, 1912. On the 29th of June, 1912, an order for the transfer of the three cases to the court of the City Magistrate was made. On the 1st of July, 1912, the opposite party, namely, Musammat Rupia and Gauri Shanker, objected to the order of transfer on the ground that no notice of the application for transfer had been given to them. The District Magistrate cancelled his order of 29th June, 1912, and fixed the 6th of July, 1912, for the hearing and disposal of the transfer applications. On that date some oral evidence was recorded by the District Magistrate and an order of transfer was made. On the 15th of July, 1912, Pandit Kundan Lal and Nawab Khakan Husain, the Honorary Magistrates, addressed a letter to the District Magistrate, denying the allegations contained in the three declarations of Ram Prasad, Puttan Lal and Ala Bakhsh, and submitting their own affidavits contradicting the said declarations. After hearing the parties concerned the learned District Magistrate sanctioned the prosecution of Ram Prasad, Puttan Lal and Ala Bakhsh, under section 199 of the Indian Penal Code. It is against this order that the applicant, Ram Parasad, has filed the present application. It is contended by his learned counsel that the order of the learned District Magistrate is *ultra vires*, that no valid ground for granting the sanction has been made out, and that no offence under section 199 of the Indian Penal Code has been committed by the applicant. I shall take up the last objection first. It is admitted by the applicant for the purposes of this application that a declaration was filed by him in the court of the District Magistrate with his application for transfer. It is, however, argued that the declaration was not one which the District Magistrate was bound or authorized by law to receive in evidence and to act upon it, and indeed he did not consider it evidence for he examined some witnesses on the basis of whose

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statements an order of transfer was made. Therefore, if the declaration in question contained any false statement, no offence under section 199 of the Indian Penal Code has been committed. In support of this contention the following cases have been cited :—(1) *In the matter of the petition of Iswar Chunder Guho and others* ⁽¹⁾, (2) *Abdul Majid v. Krishna Lal Nag* ⁽²⁾, (3) *Chandi Pershad v. Abdur Rahiman* ⁽³⁾. I think that the contention for the applicant must prevail. A declaration before it can be made the foundation of a prosecution under section 199 of the Indian Penal Code, must be one which is admissible in evidence, and which the court, before which it is filed, is bound or authorized by law to receive in evidence. The suggestion that there is no prohibition against the reception of such declaration in evidence does not render it admissible or the declarant amenable to the provision of section 199 of the Indian Penal Code. It is not pointed out for the opposite party that the declaration filed by Ram Prasad, was one which under the Criminal Procedure Code, or any other law, the court before which the proceedings were pending, was bound or authorized to receive in evidence. I therefore hold that the sanction granted by the learned District Magistrate for the prosecution of the applicant under section 199 of the Indian Penal Code, cannot be upheld. It is unnecessary to discuss the other objections taken on behalf of the applicant. I, therefore, set aside the order of the learned District Magistrate, dated the 30th July, 1912, as against Ram Prasad.

Sanction quashed.

(1) [1887] I. L. R., 14 Cal., 653

(2) [1893] I. L. R., 20 Cal., 724.

(3) [1894] I. L. R., 22 Cal., 131.

PITAMBER LAL

versus

SARDA PRASAD AND ANOTHER.*

Criminal Procedure Code, sections 145, 148—Referring of issues raised in the case to subordinate court—Illegal.

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RAFIQ, J.

Where in proceedings under section 145 of the Code of Criminal Procedure the issues raised were referred to a subordinate court for enquiry and the Magistrate acted on the report, *held* that the Magistrate could not refer under section 148 of the Code the only issues raised and decide the case without examining any witness merely on the report of of the subordinate court.

CRIMINAL REVISION from an order of J. N. G. Johnson, Esq., Magistrate, First Class, of Allahabad.

Satya Chandra Mukerji, for the applicant.

L. M. Banerji (for Assistant Government Advocate), for the Crown.

Durga Charan Singh and *Ram Narain Lal*, for the opposite parties.

The following judgment was delivered by

RAFIQ, J.—This is an application in revision contesting an order of the learned Joint Magistrate of Allahabad, which purports to have been passed under section 145, Criminal Procedure Code. The relevant facts of the case are as follows :—One Shah H uji Jan and some others are the owners of a *mandi* in the town of Allahabad, known as *Khalifa-ki-Mandi*. The applicant, Pitamber Lal, was the lessee of that *mandi* and his lease, which is said to have been given in 1902, was to expire on the 21st of June, 1912. Prior to the expiry of his lease another lease was given to Sardha Prasad and Bhola Ram as long ago as 1908, which was to take effect on the expiry of the lease of Pitamber Lal, *i. e.*, after the 21st of June, 1912. On the 26th of June, 1912, the police submitted a report that there was a likelihood of the breach of the peace between the two lessees over the collection of the *mandi* dues. The Magistrate acted on that report and issued notices to the

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* Cr. Rev. No 709 of 1912.

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applicant and the opposite parties on the 27th of June, 1912, to show cause. On the 9th of July, 1912, the learned Magistrate made an order referring two issues to the Tahsildar for a report. The order of the Magistrate must be quoted here in order to appreciate the contention of the applicant. The order is as follows: "Parties appear before me to-day and put in their written statements. The matter is obviously one for local inquiry such as is provided for in section 148 of the Code of Criminal Procedure. The Tahsildar will conduct this local inquiry and make a full report to me on the result. The papers forming the record of this case, including the written statements of the parties, will be sent to him to aid him in his inquiry. The main facts at which he must strive to arrive are (1) Were any, and if so, which of the parties in possession of the share of the *mandi* at the time when this trouble first arose, *i. e.*, the 26th and 27th of June? (2) Had any party within two months next before that date been forcibly and wrongfully dispossessed? The Tahsildar will have no concern with the merits of the claims of the parties to possess the share of the *mandi*. He must devote his attention to the points I have mentioned above, and there will be no need for him to go into a long discussion about title-deeds and the like. His report should be submitted within ten days' time. Case to be put up after ten days." The Tahsildar submitted his report on the two issues. No evidence was recorded by the Magistrate on behalf of Sardha Prasad and Bhola Ram. Some evidence was recorded on behalf of Pitamber Lal. On the 9th of August, 1912, the learned Magistrate accepted the report and the conclusions of the Tahsildar and passed an order in favour of Sardha Prasad and Bhola Ram. Pitambar Lal dissatisfied with that order has come up in revision to this Court. He has taken three legal objections to the proceedings in the lower court. He says that the learned Magistrate did not write an order stating the reasons which made him believe that there was a likelihood of the breach of the peace between Pitamber Lal and his opposite parties. Further it is said that no copy of such an order was served on the applicant. The last and the most important objection is that the order of the lower court proceeds practically upon the report of the

Tahsildar. The learned Magistrate could not under the law, it is said, refer the inquiry into the issues raised in the case to the Tahsildar. I think that this last objection is sound and must prevail. A perusal of the order of the learned Magistrate, dated the 9th of July, 1912, shows that the issues involved in the case were remitted by him to the Tahsildar for inquiry and trial. The learned Magistrate did not hear all the evidence himself in the case, and his order clearly shows that he accepted the report of the Tahsildar in its entirety. According to the admitted facts in the case, Pitamber Lal was in possession up to the 21st of June, 1912. He could not have given up possession willingly and then turned round in five days, *i. e.*, on 26th June, 1912 (the date on which the police made a report) and contested the possession of Sardha Prasad and Bhola Ram. The learned Magistrate, it is said, would have come to a different conclusion had he taken all the evidence himself. Without expressing any opinion as to the merits of the case, I think that the proceedings of the lower court are open to objection. The order of 9th June, 1912, purports to have been made under section 148 of the Criminal Procedure Code which does not enable a court to have the trial of the issues raised in a case determined by a court subordinate to itself. The case of *Baikunt Kumar and others* (1) is in point. I therefore think that the proceedings of the lower court were not held according to law. I therefore set aside the order of the learned Magistrate, dated the 9th of August, 1912.

CRIMINAL

1912.

Pitamber Lal

v.

Sardha Prasad

Rafiq, J.*Application allowed.*

(1) 3 C. L. R., 134

CRIMINAL

1912.

October, 4.

RAFIQ, J.

GIGA

versus

MUHAMMAD AMIN.*

Master and Workmen Act (XIII of 1859)—Application of—Specific work—Workman already doing work.

The loans that can be recovered under Act XIII of 1859, are the loans which are advanced by employers to their workmen for doing specific work.

When the money was advanced not for doing any particular work but for the work which the workman was already doing and the work was finished by the time of prosecution, *held* that the Act did not apply.

CRIMINAL REVISION from an order of W. F. Kirton, Esq., Sessions Judge of Cawnpore.

E. A. Howard (for whom *Satya Chandra Mukerji*), for the applicant.

R. Malcomson (Assistant Government Advocate), and *W. K. Porter*, for the opposite party.

The facts of the case will appear from the following judgment which was delivered by

Rafiq, J.

RAFIQ, J.—This is an application in revision by one Giga, praying that the order of the learned Cantonment Magistrate, dated the 23rd of July, 1912, be set aside. It appears that Giga had employed Muhammad Amin, the opposite party, to work at the shop of the former. Muhammad Amin took a loan from the applicant for which he gave an agreement. Before the loan had been paid off, Muhammad Amin left the service of Giga. The latter filed a complaint under Act XIII of 1859, in the court of the Cantonment Magistrate, for the recovery of the loan or for an order directing Muhammad Amin to return to work. The learned Magistrate referred the matter to arbitration. The majority of the arbitrators filed an award decreeing Rs. 51-4-0, to Giga, the applicant. That sum, I understand, has been paid. It is contended for the applicant that the learned Magistrate had no jurisdiction to delegate his powers under Act XIII

of 1859, to arbitrators. I find that the objection taken by the applicant need not be considered as his application must fail on another ground. The loans that can be recovered under Act XIII of 1859, are the loans which are advanced by employers to their workmen for doing specific work. In the present case it is admitted that the money advanced to Muhammad Amin was not advanced for doing any particular work. Whatever work he was doing at the time that he took the loan had been finished and nothing of it remained to be done. Under these circumstances the applicant's petition to the learned Magistrate could not be entertained, vide *In the matter of Anusoori Sanyasi* (1). The application fails and is rejected.

(1) [1904] I. L. R., 28 Mad., 37

Application rejected.

CRIMINAL

1912.

Giga

v

Amin.

Rafiq, J.

MUHAMMAD ABDUL AZIZ.

versus

RAFI-UN-NISSA BIBI AND ANOTHER.*

Lambardar and co-sharer—Suit for profits—Pendency of partition proceedings—No bar—Civil Procedure Code—Order 2, Rule 2—Two suits—First for share of plaintiff's profits—Second for share of other sharer's profit which plaintiff takes by assignment—No bar.

The pendency of a suit for partition is no bar to a suit by a co-sharer for profits against the *lambardar*.

Where two suits are brought against a *lambardar* by a co-sharer, one for her own share of the profits and the other as assignee of another co-sharer, the second suit is not barred by Order 2, Rule 2, of the Code of Civil Procedure.

There is no provision of law regulating what interest ought to be allowed to a successful plaintiff suing for profits against a *lambardar*. In fixing a rate which interest ought to be allowed the analogy of what is allowed in favour of a landlord against a defaulting tenant is not an unreasonable one.

* F. A. No. 6 of 1911.

CIVIL.

1912.

October, 22.

RICHARDS, C.J.
BANERJI, J.

[CIVIL

1912.

Abdul Aziz

v.

Rafi-un-nissa.

FIRST APPEAL from a decree of Babu Atibal Singh, Assistant Collector, First Class, of Jaunpur.

The facts of the case appear from the judgment.

Suit for profits.

The court below decreed the suit.

Defendant appealed.

W. R. Porter, Surendra Nath Sen and Shafi-us-saman, for the appellant.

A. H. C. Hamilton, and *J. N. Chaudri*, for the respondents.

The judgment of the Court was delivered by

Richards, C. J.

RICHARDS, C. J.—This and the connected appeals arise out of suits for profits against the *lambardar*. The plaintiff, Musammat Rafi-un-nissa, in the first appeal which arises out of suit No. 2 of 1909, sues for certain arrears of profits as vendee of the share of her husband Abdul Jalil. The other First Appeal No. 334, arises out of suit No. 3 of 1909. In that suit the plaintiff claimed merely as assignee of the profits. The profits being originally due to Abdul Alim. The connected second appeals also arise out of suits for profits under similar circumstances. All the appeals can be conveniently disposed of by a single judgment.

The first point taken by the learned Advocate on behalf of the appellant is grounded on the following circumstances. It appears that a suit was brought in the year 1905 to which the present defendant was a party for the partition of certain property including the property in respect of which the profits are claimed in the present suits. It would appear that that suit which was commenced in the year 1905, has got only as far as the filing of the written statement. Who is to blame for this gross delay does not appear, but it is a matter for which both parties must to some extent be accountable. The Judge, in whose court the case is pending, himself ought to have taken some steps to prevent a case remaining pending for such an unreasonable period. However, all that we have to consider in the present appeal is whether or not the pending of that suit is a bar or ought to prevent a decree being given in favour of the plaintiff assuming her to be otherwise entitled

thereto. We entirely agree with the court below that it is no bar and that it ought not to interfere with the decrees being granted in the present suits.

The next ground was the suggestion that the plaintiff by bringing a suit for profits in respect of the share of which she was owner and being also entitled to the profits which she claimed in the second suit as assignee has split her cause of action and that the second suit was barred by the provisions of Order 2, Rule 2, of the Code of Civil Procedure. Reliance was placed on the case of *Shafkat-un-nissa v. Shib Sahai and others*⁽¹⁾, and *Murti v. Bhola Ram and another*⁽²⁾. In our opinion, the circumstances of these two cases are quite distinguishable from the present. In the present cases the plaintiff's cause of action is quite distinct, in one case she is the absolute owner of the property in respect of which she claimed profits, in the other case she is merely the assignee of the profits, due to her vendor. In addition to this the vendor in each case was different.

The third ground was that the court below was wrong in allowing 12 per cent. interest. There is no actual provision of law regulating what interest ought to be allowed to a successful plaintiff suing for profits against a *lambar-dar*. The court below appears to have acted on the analogy of what is allowed in favour of a landlord against a defaulting tenant. We think that this is not an unreasonable analogy and we see no sufficient reason to interfere with the discretion of the court below in the amount of interest allowed. In some cases, there might be special circumstances which would render it inequitable to give a high rate of interest, but no such special circumstances have been brought to our notice in the present case and, furthermore, the question of the rate of interest distinguishable from giving interest at all, does not appear to have been raised in the court below.

The fourth point was that the court below decided the case without hearing certain witnesses of the defendant. We are referred to an order on the order sheet, dated the 26th of September, 1910. It does not appear from

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Abdul Aziz

v.

Rafi-un-nissa.

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Richards, C. J.

(1) [1881] I. L. R., 4 All., 171. (2) [1893] I. L. R., 16 All., 165.

CIVIL.

1912.

Abdul Aziz

v.

Rafi-un nissa.

Richards, C. J.

anything to which our attention has been called that any application was made to the court below to adjourn the hearing of the case upon any reasonable grounds and that such application was refused. Furthermore this ground of appeal has not been supported by any evidence which would lead us to the conclusion that the court below had acted unfairly or improperly. In our opinion this ground of appeal has no force whatever.

The fifth ground was hardly pressed and in our opinion has no force whatever. It is suggested that because there is a clause in the *wajib-ul-arz* that no division of profits was necessary, that therefore the profits could not be sued for. It is quite clear that this provision in the *wajib-ul-arz* dealt with the period when the owners of the property were joint in food and business. A circumstance which has long since ceased to exist.

There were certain other minor grounds which were mentioned in the course of the argument which has been fully dealt with in the judgment of the court below with which we agree.

The result is that the appeal fails and is dismissed with costs.

Some objections were filed on behalf of the respondents as to the amount allowed against the *lambardar*. We think that the court below dealt with the case fairly and justly upon such evidence as the parties on both sides thought fit to adduce. We think there is no force in the objection and accordingly dismiss them with costs.

Appeal dismissed.

BADRI PRASAD

versus

KING-EMPEROR.*

CRIMINAL

1912.

October, 24.

KNOX, J.
RAFIQ, J.

Practice—Criminal case—Evidence recorded by Assistant Sessions Judge—Judgment by Sessions Judge—Jurisdiction—Penal Code—(Act XLV of 1860)—Sections 476, 471—Alternative charge.

Where an Assistant Sessions Judge heard the evidence but did not pronounce judgment but the Sessions Judge pronounced judgment on the evidence so recorded, *held* that the Sessions Judge had no jurisdiction to do so.

Held further, that an accused can be convicted at the same trial of forging a document and using that document as forged and the charges under sections 467 and 471 of the Indian Penal Code may be regarded as alternative

Held further, that the intention of the Criminal Procedure Code is that a trial before the Court of Sessions should proceed and be dealt with continuously from its inception to its finish, and that it is inexpedient for a sessions trial to be adjourned except only on the strongest possible ground and for the shortest possible period.

CRIMINAL APPEAL from an order of E. C. Allen, Esq., Sessions Judge of Mainpuri.

Satya Chandra Mukerji, for the appellant.

R. Malcomson (Assistant Government Advocate), for the Crown.

The judgment of the Court was delivered by

KNOX, J.—Badri Prasad has been convicted of an offence under section 471 of the Indian Penal Code and sentenced to a term of rigorous imprisonment and payment of a fine. He has appealed. We do not go into the facts of the case in view of the order which we propose to make. There has been unfortunately in the trial an irregularity which compels us to set it aside and to order a new trial. Badri Prasad was committed to the court of Sessions at Mainpuri. The case was transferred by the court of sessions to the court of an Assistant Sessions Judge. The Assistant Sessions Judge heard the case so far as the evidence was concerned, but did

Knox, J.

CRIMINAL.

1912.

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Knox, J.

not proceed to judgment on the ground that one of the issues in the case was at the same time awaiting decision under appeal in the court of the District Judge, and we are told that the case remained pending for a year when it was taken by the court of Sessions at Mainpuri sitting at Etawah. The learned Sessions Judge did not hear the evidence at all but proceeded to judgment upon the evidence recorded by the Assistant Sessions Judge. He had no jurisdiction to do this. The judgment and sentence are a judgment and sentence passed without jurisdiction and must be set aside. We notice a mistake of law, into which the learned Sessions Judge has fallen. He says that it is settled law that in such a case the accused cannot be convicted at one and the same time of forging a document and using that document as forged and the charges under sections 467 and 471 must, therefore, be regarded as alternative. We know of no authority to this effect and none has been pointed out to us. It must be distinctly understood that we pronounce no opinion whatever upon the evidence relating to either of these charges. Moreover, we wish to point out that it is most inexpedient for a sessions trial to be adjourned. The intention of the Code is that a trial before a court of sessions should proceed and be dealt with continuously from its inception to its finish. Occasions may arise when it is necessary to grant adjournments, but such adjournments should be granted only on the strongest possible ground and for the shortest possible period. With these remarks we allow the appeal so far that we set aside the conviction and sentence and send back the case for trial before the court of Sessions at Fatehgarh.

Record returned.

MUNSHI LAL AND ANOTHER

versus

RAM NARAIN.*

CIVIL.

1912.

October, 28.

TUDBALL, J.
RAFIQ, J.

Limitation—Application for setting aside sale—Deposit of 5 per cent. extra—Property sold 22nd August but deposit not accepted till 28th—Effect of.

Certain property was put up for sale in execution of a decree on 22nd August, 1911, but the sale officer did not make a declaration as to who was the purchaser but referred to the civil court for some information on receiving which on 28th August he directed the person whose bid was the highest to deposit the usual one-fourth of the price. On September 23 the sale was confirmed *ex parte*. The civil courts were closed from September 24 to October 26. The judgment-debtor on October 26th deposited the amount of the decree and 5 per cent. of the purchase money and applied for the sale to be set aside. *Held*, that the auction sale was not concluded till August 28th and that the judgment-debtor's application for setting aside the sale was not barred by limitation.

FIRST APPEAL from an order of Sheikh Muhammad Husain, First Additional Subordinate Judge of Meerut.

M. L. Agarwala, for the appellants.

J. N. Chaudri and *Sarat Chandra Chaudhri*, for the respondent.

The judgment of the Court was delivered by

TUDBALL, J.—The circumstances out of which the present appeal has arisen are as follows :—Certain property was put up for sale in execution of two decrees, one of which was for Rs. 11,521 and the other was for Rs. 2,521. Apparently when the decrees were sent to the Collector for execution, there was an error in the *rubkar* sent and Rs. 1,521 was shown as the amount due under the one decree instead of Rs. 11,521. The property was duly notified for sale, and on the 22nd of August it was put up for sale. Ram Narain was the highest bidder who bid up to Rs. 6,400. The sale officer, as his order of 22nd August shows seeing that the total amount apparently due under the decrees was Rs. 3,673, was of opinion that it was unnecessary to sell the whole of this property,

Tudball, J.

* F. A. F. O. No. 47 of 1912.

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Munshi Lal
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and made up his mind to sell it in two lots of one-half each. It is equally clear from his order of the same date that the decree-holder at once informed him that the amount due under the one decree was Rs. 11,521 and not Rs. 1,521. The sale officer made up his mind to verify this statement from the civil court, and in his order of 22nd August he distinctly states that he does not conclude the sale "*ekhtetam-i-nilam mansur nahin kia ja sakta*," and he postponed the matter till he received information. On the 28th of August he received information that the correct amount due under the decree was Rs. 11,521. He accordingly noted this in his order which distinctly states that he concludes the sale as it is unnecessary to sell the property afresh in two lots. On that same date he received from Ram Narain the one-fourth deposit which it is necessary to make under Order 21, Rule 84, of the Code of Civil Procedure. On the 23rd of September on an *ex parte* application the civil court confirmed the sale. From the 24th of September till the 26th of October the court closed for vacation. On the 26th of October the judgment-debtor deposited the amount of the decree plus 5 per cent. of the purchase money as required under Order 21, Rule 89, and he asked that the sale should be set aside. The learned Subordinate Judge refused to set aside the sale, being of opinion that it was impossible for him to do so after he had once confirmed the sale. The judgment-debtor comes here in appeal, and it is urged, we must admit, with considerable force that the auction sale was not concluded until the 28th of August, that the deposit made on the 26th of October was a deposit made within time, *i. e.*, within thirty days of the sale, omitting the vacation, and that the learned Subordinate Judge was not debarred from setting aside the sale merely because he had, on the 23rd of September, by an *ex parte* order, confirmed it. It is contended on behalf of the respondent that the sale in the present instance took place on the 22nd of August, and that if the judgment-debtor wished to make a deposit, he was bound to do so before the 22nd of September. In our opinion in view of what took place on the 22nd of August and the lengthy order passed by the sale officer on that date, and the action that he took in the meantime, and his order of the 28th of August, it is quite clear that the sale was not

concluded until August the 28th. We cannot accept the contention that directly a bid is made the sale is concluded. In his order of 22nd August the sale officer distinctly and in very clear language stated that he did not conclude the sale, that the final bid was not there, and that it was his intention to split up the property in lots and put up the same afresh. Under Order 21, Rule 84, a person who is declared to be the purchaser at a sale has to immediately after such declaration make a deposit of 25 per cent. on the amount of his purchase money to the officer conducting the sale. It is, therefore, quite clear that for the conclusion of a sale it is necessary for the sale officer to accept the final bid and to make a declaration as to who is the purchaser and to order that purchaser to forthwith pay over 25 per cent. of the purchase money. It is clear that if such deposit is not made immediately, it is open to the sale officer to continue the sale afresh, and such auction purchaser who fails to make the deposit is liable for the difference between the amount of his own bid and that of the final bid which may be accepted by the sale officer. Our attention has been called to a ruling in *Chowdhry Kesri Sahay v. Giani Roy* (1). It is of no assistance whatsoever to us in the present case, nor was the point (which now arises) before the court at the hearing of that case. It seems to us that the matter is simply one for the exercise of a little common sense. The mere making of the last bid does not conclude the sale, and in our opinion in the present case the sale was concluded on the 28th of August, which is evidenced by the fact that on that date the sale officer declared Ram Narain to be the purchaser and made him pay 25 per cent. of the deposit under Order 2, Rule 84. It is equally clear that the judgment-debtor could not have made a deposit and applied to have the sale set aside prior to August 28th. In this view it is quite clear that the deposit made on the 26th of October, by the appellant was made within time. The learned Subordinate Judge was not precluded by reason of his order of 23rd September from accepting this deposit and setting aside the sale. An *ex parte* order passed on that date could not deprive the present appellant of his rights under

(1) [1902] I. L. R., 29 Cal, 626,

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Munshi Lal

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the law, and it was the Subordinate Judge's duty to set aside the sale. We, therefore, admit the appeal, and set aside the order of the court below. The sale of the 28th of August, 1911, will be set aside. The appellants will have their costs in both courts.

Appeal allowed.

CIVIL.

1912.

October, 30.

TUDBALL, J.
RAFIQ, J.

CHUTTAN LAL

versus

KANHAYA LAL.*

*Practice—Civil Procedure Code (Act V of 1908), Order 17, Rule 2—**Plaintiff absent—Suit dismissed as not proved—Appeal.*

Where a suit is dismissed by an Assistant Collector by the following order: "The plaintiff had failed to prove his case and has failed to prosecute his case, it is ordered that his case is dismissed for default" Held that the Assistant Collector had not taken action under Order 17, Rule 2, of the Code of Civil Procedure and had dismissed the suit as plaintiff had failed to prove it and an appeal lay against the order of the Assistant Collector.

FIRST APPEAL from an order of H. S. Rix, Esq., District Judge of Aligarh.

Peary Lal Banerji, for the appellant.

Satish Chandra Banerji, for the respondent.

The judgment of the Court was delivered by

Tudball, J.
Rafiq, J.

TUDBALL and RAFIQ, JJ.—This appeal has arisen out of the following circumstances. The plaintiff-respondent brought a suit for profits as assignee of the right of a co-sharer against the *lambardar* in the court of an Assistant Collector of the first class. The suit was first of all dismissed for default of appearance and was subsequently reinstated on the application of the plaintiff. Various dates were fixed and issues were framed. The 4th of April was finally fixed for the taking of the evidence of the parties and the decision of the suit. The plaintiff's *mukhtar* though he had filed an

application for summoning the witnesses apparently had delayed in paying in the necessary diet money. The summonses to witnesses had, therefore, not been served. The *patwari*, one of the witnesses, had apparently attended at a previous day and was again present on the 4th of April. The plaintiff's *mukhtar* on that date wished to examine him as a witness. As, however, the *patwari* had been present for several days at the court, the Assistant Collector ordered the *mukhtar* to pay him a certain amount of extra diet money. This the *mukhtar* refused to do, whereupon the court refused to allow him to examine the witness. The rest of the plaintiff's evidence was not forthcoming. The court accordingly adjourned the case to the 13th of April, for the purpose of delivering judgment. As the Assistant Collector's order on the back of the application shows, after the case had been closed, the *mukhtar* put in an application for adjournment to enable him to again summon his witnesses. This the Assistant Collector for reasons given by him good, bad, or indifferent, refused to allow, and on the 13th of April, the Judge delivered a judgment dismissing the plaintiff's claim. That judgment ends as follows: "The plaintiff is the vendee of the profits of Hoti Lal, co-sharer. The sale-deed is an unregistered one. Even the necessary witnesses to prove the deed were not summoned. As the plaintiff has failed to prove his claim and has failed to prosecute the case, it is ordered that the plaintiff's claim be dismissed for default and that he should pay the defendant's costs." The judgment was written in vernacular, and the word which has been translated as default is the word *adam-pairawi*. From the decision of the Assistant Collector an appeal was preferred to the District Judge who remanded the case to the court of first instance for decisions on its merits. The defendant has brought this appeal against this order of remand, and in the commencement it is admitted that no appeal lies to this court from an order of remand, and an application has been filed asking this court to treat the appeal as a revision. The point taken is that the decision of the first court is not a decree but an order of dismissal for default, and therefore no appeal lay to the District Judge. On behalf of the respondent the opposite party a plea is taken that there is no machin-

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Chuttan Lal
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Kanhaya Lal.

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Rafiq, J.

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Chuttan Lal
v.
Kanhaya Lal.Tudball, J.
Rafiq, J.

ery in the Tenancy Act which enables this Court to revise an order of remand passed by the District Judge, that section 115 of the Code of Civil Procedure does not apply, and that even under that section this Court has no power to revise the order in question. It is unnecessary to decide the points raised on behalf of the respondent, because we are clearly of opinion that the court of first instance did not take action under Rule 2 of Order 17, but that it took action under Rule 3 of that same order and that it simply dismissed the plaintiff's suit as he had failed to prove his case. In this view it is quite clear that an appeal did lie to the District Judge. There is therefore, no reason whatsoever for interference on revision even if we had power to entertain such an application. In this view the appeal fails and the application is disallowed. The opposite party will have his costs.

Appeal dismissed.

CIVIL

1912.

July, 2.

CHAMIER, J.
RAFIQ, J.

BADRI DAS

versus

JIVAN LAL AND ANOTHER.*

Vendor and purchaser—Portion of price left with vendee to clear encumbrances—Right of vendor.

Certain property was sold by a private sale. The property was subject to a mortgage and a sum of money was left in the hands of the purchaser for the purpose of redeeming the mortgage, but the amount due on the mortgage was in excess of the amount left in the hands of the purchaser. The mortgagee instituted a suit for sale and in execution sold the property which fetched a smaller sum than was left in the hands of the purchaser. In a suit by the vendors against the purchaser for recovery of the difference between the amount left in the hands of the purchaser and the amount the property fetched at the auction sale, *held* that the plaintiffs after a decree had been passed on the mortgage should have paid into court the difference between the amount due and the amount left in the hands of the purchaser and then have called on the defendant to pay the sum which was in his hands. It was the duty of the vendors to give a clear title to the purchaser subject only to the

*S. A. No. 86 of 1912.

payment by purchaser of the sum left in his hands. *Mohammad Siddiq Khan v. Mohammad Nasir-ul-lah Khan*, [1899] 1. L. R., 21 All, 223 P. C., followed

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1912.

Badri Das

v.

Jivan Lal.

SECOND APPEAL against the decree of W. R. G. Moir, Esq., District Judge of Mirzapur, modifying the decree of Thakoor Udit Narain Singh, Subordinate Judge of Mirzapur.

- The plaintiffs sold a half of certain property to the defendant for a sum of Rs. 6,900. The whole property was subject to a mortgage in favour of one Kanhaya Lal. The defendant paid Rs. 1,400 to the plaintiffs and the balance, Rs. 5,500, was left with the defendant for payment to Kanhaya Lal, mortgagee. According to the plaintiffs a smaller sum than Rs. 5,500, would have sufficed to redeem Kanhaya Lal's mortgage. Nine days after the sale the defendant deposited the sum of Rs. 5,500, in court to the credit of the mortgagee under section 83 of the Transfer of Property Act. The mortgagee in reply stated that the whole amount due upon the mortgage exceeded Rs. 5,500, and he was not prepared to receive the money unless the full amount was paid. The plaintiffs, on the other hand, put in an application that a smaller sum than Rs. 5,500 was due, *viz.*, Rs. 5,430, and that the balance should be paid over to him. The mortgagee having refused to receive the money it was withdrawn by the defendant after about two months. The mortgagee then brought a suit to enforce his mortgage by sale of the entire property. The defendant put in no appearance, but in the course of the suit he was examined as a witness and stated that as the amount left with him was not withdrawn by the mortgagee, he had withdrawn the money himself and he had allowed his application for mutation to be dismissed for default because the mortgagee did not accept the money. A compromise was arrived at in that suit between the present plaintiffs and the mortgagee by which a sum of Rs. 5,556 were payable in five months, in default of which a larger sum was agreed to be realizable by sale of the mortgaged property, the half share sold to the defendant being first put up for sale. The amount not having been paid, the mortgagee put up for sale half of the property sold to the defendant and the sale proceeds amounted to Rs. 3,000 only. The plaintiffs alleging that the other half of the property was in danger of being

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1912.

Badri Das
v.
Jivan Lal.

sold, brought the present suit praying that as the defendant did not pay the Rs. 5,500, he should make good the amount minus Rs. 3,000, the amount for which the half share was sold. The defendant pleaded, *inter alia*, that the suit was not maintainable as he was not to blame.

Both the courts below decreed the suit.

Defendant appealed.

Peary Lal Banerji (with him *Uma Shankar Bajpai*), for the appellant.

The real point to be considered is whether the plaintiffs were to blame or the defendant. The defendant had as a matter of fact paid in the amount left with him. It was not obligatory upon him to pay a larger amount than Rs. 5,500 to the mortgagee; though it was of course open to him to do so if he cared. In the deed, it is true, there is a covenant by the vendor to repay to the vendee any excess that he might have to pay, but that is the usual stipulation to be found in every deed and does not affect the matter. The whole question is whether the defendant was purchasing the property free from encumbrance or was taking it subject to the mortgage. The very fact that the sum of Rs. 5,500 was left with him goes to show that it was left as a security that the plaintiffs were giving a clear and free title. It was not at all incumbent upon the defendant to pay off the prior mortgagee unless the plaintiff was willing to find the extra amount that was necessary. Even after the decree was passed it was for the plaintiffs to offer to pay the excess before any duty arose on the part of the defendant to pay Rs. 5,500. He could only be asked to pay the sum of Rs. 5,500 if he were getting the property free and unencumbered. He could not both lose his money and run the risk of losing the property as well.

Mohammad Siddiq Khan v. Mohammad Nasir-ul-lah Khan, [1900] I. L. R., 21 All., 223, P. C.

As regards the equities of the case they are all in the defendant's favour. The defendant had lost Rs. 1,400, had also lost the property he had bargained for and he had received nothing in exchange. The whole blame was on the plaintiffs and they must be made to bear the consequences of their obstinate neglect.

Sundar Lal, for the respondent.

The defendant should not have withdrawn the amount. He had undertaken to pay Rs. 5,500, and he was bound to pay that to the mortgagee. If he had to pay anything in excess he might have sued the plaintiffs. The Privy Council case relied on is distinguishable because in that case there was an undertaking by the vendor to pay any excess that would be found due to the mortgagees. In the present case there was no such contract. On the other hand the covenant in the deed shows that the parties contemplated the possibility of the defendant-vendee having to pay more than Rs. 5,500.

Peary Lal Banerji, was heard in reply.

The judgment of the Court was delivered by

CHAMIER, J.—On June 9th, 1908, the plaintiffs sold half a village to the defendant, Badri Das, for Rs. 6,900, of which Rs. 1,400 were paid in cash to the plaintiffs and the balance Rs. 5,500 was left in the hands of the defendant on account of the amount due on a prior mortgage of the whole village held by one Kanhaya Lal. On the 18th of June, 1908, the defendant deposited Rs. 5,500 in court under section 83 of the Transfer of Property Act. By this time Kanhaya Lal had died leaving an infant heir. The child's guardian refused to accept the money, saying that a larger sum was due on the mortgage and the plaintiffs put in an application, stating that the whole of the sum deposited was not due to the mortgagee, but that accounts should be taken and the amount found due paid to the mortgagee and the balance paid to the plaintiffs. The courts below have found that there was no agreement between the plaintiffs and the defendant that they would go to the mortgagee and settle accounts with him and the defendant would repay the balance, if any, remaining in his hands to the plaintiffs.

Kanhaya Lal's heir sued upon the mortgage impleading both the present plaintiffs and the defendant. The latter did not defend the suit. The present plaintiffs and the mortgagee entered into a compromise according to which Rs. 5,556 were agreed to be due on account of the mortgage money and a further sum on account of costs, and in default of payment the amount was to be recovered in the first ins-

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tance by sale of that half of the village which had been sold to the defendant. A decree was prepared accordingly, and in execution of that decree the defendant's half share in the village was sold for Rs. 3,000. The plaintiffs applied to have the sale set aside, but they subsequently abandoned the application and they brought the present suit in July, 1910, for the recovery of Rs. 2,500, being, as they alleged, the balance of the amount still due from the defendant, the amount of costs incurred by them in the previous suit and the amount of revenue paid by them for the defendant's half share of the village and interest, making a total of Rs. 3,849 odd. The court of first instance decreed the claim and the lower appellate court confirmed that decree with a slight modification.

In second appeal it is contended on behalf of the defendant that under the sale deed in his favour, he was not bound to find more than Rs. 5,500 for the redemption of Kanhaya Lal's mortgage, that he had done all that was required of him when he deposited this sum in court under section 83 of the Transfer of Property Act and that he was not bound to discharge the decree obtained by Kanhaya Lal's heir as the amount due under that decree exceeded Rs. 5,500, that under the sale-deed in favour of the defendant it was the duty of the plaintiffs-vendors to give a clear title to the eight annas share which they sold to the defendant, and all that they could do was to call upon the defendant, to contribute the sum of Rs. 5,500 towards the redemption of Kanhaya Lal's mortgage and the defendant has relied upon a decision of the Privy Council in *Mohammad Siddiq Khan v. Mohammad Nasir-ullah Khan* ⁽¹⁾, which he says exactly covers this case. The plaintiffs-respondents, on the other hand, contend that under the sale-deed, the defendant was bound to redeem the mortgage held by Kanhaya Lal even if he had to pay a sum exceeding Rs. 5,500 in order to do so and they rely upon the second clause in the sale deed which is to the effect that if any further charge were found to exist on the property and the defendant had to pay more than Rs. 5,500, he would be entitled to recover the balance from the vendors, and the plaintiffs contend that this case is distinguishable from the case decided by the Privy Council. It seems to us impossible

(1) [1899] 1, L. R., 21 All., 223.

to hold that the second condition in the sale-deed made it incumbent on the purchaser to redeem Kanhaya Lal's mortgage even if he had to pay more than the sum left in his hands by the vendors for the purpose. The clause in question gives him only the right which he would have had if this clause had not been inserted in the deed. As a purchaser of the property said to be free of all incumbrances except one for Rs. 5,500, he would have been entitled if he paid a larger sum in order to clear the title, to claim the balance from his vendors. We have referred to the printed record of the case decided by the Privy Council and we are unable to distinguish that case from the present one. Pandit Sundar Lal endeavoured to distinguish the two cases on the ground that in that case both this Court and the Privy Council held that it was part of the contract between the parties that the vendors should pay off the mortgages, and he relied on the fact that oral evidence of such an arrangement was given at the trial. On referring to the record we find that this Court held that vendors had agreed to discharge the mortgages, not on the strength of the oral evidence, the admissibility of which seemed doubtful, but on the terms of the sale-deed itself. The Privy Council in their judgment confirmed the finding of this Court. Whether the Privy Council proceeded upon that oral evidence or not, we think that this case is not distinguishable from that case. There, as here, a sum of money was left in the hands of the purchaser for the purpose of redeeming the prior mortgage. It turned out that the amount due was far in excess of the amount left in the hands of the purchasers. There, as here, it was the duty of the vendors to give a clear title to the purchaser subject only to the payment by the purchaser of the sum left in his hands. In the present case the difference between the amount left in the defendant's hands and the amount found due on the mortgage is small, but the decision should be the same whether the difference is great or small. Pandit Sundar Lal declined to argue that the defendant in this case would have been bound to find a sum of, say Rs. 10,000, for the redemption of Kanhaya Lal's mortgage. The plaintiffs after a decree had been passed on Kanhaya Lal's mortgage should have paid into court the difference between the amount due and the amount left in the hands of the defendant and then have called on the defendant to pay the

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sum which was in his hands. They did nothing of the kind. It was their duty to give the defendant a clear title and it was their fault that the defendant's property was sold. In our opinion the suit should have been dismissed. We allow the appeal, set aside the decrees of the courts below and dismiss the suit with costs.

A. C. M.

Appeal decreed.

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PRIVY COUNCIL.

MOOSA GOOLAM ARIFF AND OTHERS

versus

EBRAHIM GOOLAM ARIFF AND OTHERS.

Company—Registration—Memorandum of Association—Certificate of Registrar—Conclusiveness of the certificate—Indian Companies Act (VI of 1882), section 6—Res judicata—Code of Civil Procedure (Act XIV of 1882), section 13, Explanation II.

The use of the word "otherwise" in section 6 of the Indian Companies Act (VI of 1882) shows that the statutory condition that the memorandum of association must be signed by seven persons isasmuch as a condition of registration as any other requisition to be found in the Act which is preliminary to registration and apparently essential, and the certificate of incorporation granted by the Registrar under the Act is conclusive that all requisitions of the Act in respect of registration have been complied with.

The validity of certain conveyances to a Company registered under the Indian Companies Act, 1882, was established in a suit brought against the Company and others by the plaintiff, who subsequently brought another suit against the same parties to have it declared that the Company was not duly incorporated and that the property conveyed to it should be transferred to "the persons entitled to the same": *Held*, that the question of the validity of the incorporation of the Company might and ought to have been made a ground of attack in the first suit, and that the second suit for that purpose was barred as *res judicata* under section 13, Explanation II of the Code of Civil Procedure (Act XIV of 1882).

Kameswar Pershad v. Rajkumari Rutun Koer, L. R., 19 I. A., 234; S. C. I. L. R., 20 Cal., 79 followed.

APPEAL from a decree of the Chief Court of Lower Burma, on its appellate side, reversing a decree of the same court on its original side. The questions for determination in the appeal were :—(1) whether the issue of the certificate of incorporation of the Goolam Ariff Estate Company, Limited, by the Registrar of Joint Stock Companies under the Indian Companies Act, 1882, was conclusive as regards the validity of the signatures to its memorandum of association, and (2) whether the suit was barred by the rule of *res judicata*.

By seven deeds of gift, each dated the 2nd April, 1902, one Hajee Goolam Ariff transferred to his two junior wives and five minor children certain undivided shares of his properties. One Hassim Cassim Patail was appointed guardian of the properties of the five minor children, under the Guardian and Wards Act, 1890, as the result of five separate applications by their father to the Court, on the following 10th April. The application in each case stated that it "has been made to enable the said guardian to take charge and possession of infant's share in the properties to be conveyed to" the minor "and to sign certain Articles of Association of a Company under formation."

The Memorandum and Articles of Association of the Goolam Ariff Estate Company, Limited, were filed and registered at the office of the Registrar of Joint Stock Companies, Rangoon, and a certificate of incorporation was granted on 12th April, 1902. The Memorandum of Association was signed by the said Hajee Goolam Ariff, his junior wife Mariam Bibi, and Hassim Cassim Patail, the last of whom signed five times over as guardian of the five minor children severally. On the 3rd May, 1902, a deed of conveyance was executed by the said Hajee Goolam Ariff, his two wives and Hassim Cassim Patail, as guardian of the five minor children, conveying to the Goolam Ariff Estate Company, Limited, in return for shares the properties representing their shares as set out in the Memorandum of Association. In the case of the two wives and five minor children these properties consisted of undivided shares of Hajee Goolam Ariff's estate which he had transferred to them by deed of gift on the previous 2nd April. On the 16th May, 1902, Hajee Goolam Ariff died leaving a will, dated 19th April, 1902. Probate of this will

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was granted on 23rd June, 1902, to the plaintiff-respondent, Ebrahim Goolam Ariff, one of the executors, with leave to the other executors to come in and prove it. On 15th July, 1902, probate was granted to Hassim Cassim Patail, one of the appellants in this appeal.

On the 16th July, 1902, a suit, Civil Regular No. 146 of 1902, was filed by Ebrahim Goolam Ariff, as executor of his father's will, against the two widows, the five minor children and the Goolam Ariff Estate Company, Limited, for a declaration that the Deed of Gift, dated 2nd April, 1902, and the Deed of Conveyance, dated 3rd May, 1902, were void, and for other reliefs. This suit was dismissed on the 10th July, 1903. On the 10th August, 1903, an appeal was lodged, but it was dismissed on the 30th of May, 1904. A further appeal to His Majesty in Council was also dismissed on the 3rd of July, 1907.

See *Ebrahim Goolam Ariff v. Saipoo* L. R., 34 I. A., 167 ; S. C. 4 A. L. J. R., 572.

On the 23rd of June, 1904, a petition, Civil Miscellaneous No. 68 of 1904, was lodged in the Chief Court of Lower Burma under section 131 of the Indian Companies Act, 1882, praying that the Goolam Ariff Estate Company, Limited, might be wound up on the ground that it had never been duly constituted under the provisions of the Act, the number of signatories of the Memorandum of Association having been less than seven. On the matter coming on for hearing, unconditional leave to withdraw was asked for and granted.

The present suit was first filed on the 13th of September, 1904, with Ebrahim Goolam Ariff in his personal capacity as plaintiff. After the objection was heard and decided the plaint was amended, Ebrahim Goolam Ariff suing as executor and the official Receiver being added as co-plaintiff. The Company was also added as a defendant. The other defendants were the two junior wives and the five minor children of Hajee Goolam Ariff, deceased. The plaintiffs claimed that the defendant Company was not and never had been a properly incorporated Company ; that the Memorandum of Association and certificates of registration of the same, both dated the 12th of April, 1902, should be declared void ; that no Company was

constituted thereby ; and that the property purporting to have been conveyed to the said Company should be transferred to the persons entitled to the same.

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The defendants-appellants pleaded that the suit was barred by the withdrawal of the application in civil miscellaneous No. 68 of 1904 without leave to make further application ; that it was barred by the rule of *res judicata* by reason of the previous suit Civil Regular No. 146 of 1902 ; that the certificate of incorporation was conclusive and that the court had no jurisdiction to question its validity nor could the Company be wound up save under the Indian Companies Act.

The court of first instance dismissed the suit but the lower appellate court reversed the decree.

The defendants appealed to His Majesty in Council.

S. O. Buckmaster, K. C., J. W. McCarthy, and H. E. Wright, for the appellants : When the conveyances of April 2, and May 3, of 1912, were challenged in suit No. 146 of 1902, to which the Company was a party, the question that they were made to a sham company might and ought to have been raised. The respondents are now debarred from raising the question that the Company was not properly incorporated. They said in the previous litigation that the Company existed, and it is quite enough that the Company did exist. It was held in that suit that the conveyances to the Company were good and the respondents are now precluded from raising the question that there was no properly incorporated Company :

Code of Civil Procedure (Act XIV of 1882), section 12, and section 13, Explanation II.

If it be held that the Company was not properly constituted, there would simply be confusion, as the conveyances being good will remain and some new persons would have to be brought in to incorporate the Company properly.

The present suit is also barred as the question now raised was raised previously by the petition to wind up the Company presented in 1904. A petition is governed by the same rule as a suit and the withdrawal of that petition bars the present suit.

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When the respondents withdrew their petition, they did not apply for and obtain leave to institute a suit in respect of the subject-matter thereof. See

Code of Civil Procedure (Act XIV of 1882), sections 42, 43, 373 and 947.

When once the certificate of incorporation is granted by the Registrar, the Company trades and does business, and if the incorporation were challenged thereafter, there would be confusion. It is to avoid confusion that the certificate is made conclusive that all requisitions of the Companies Act in respect of registration have been complied with :

Indian Companies Act (VI of 1882), section 41.

The signature of a subscriber is a requisition in respect of registration under the Act and the Registrar is under no obligation to inquire into the capacity of the signatories to contract :

See sections 6, 8, 11 and 40 of the Act.

The word 'otherwise' in section 6 shows that the condition that the memorandum must be signed by seven persons is a requisition of registration under the Act, and that being so, the certificate of the Registrar is conclusive and the respondents cannot go behind the statute and raise the question that the signatures were not good. There is no Indian case on the point, but the authority for the contention can be inferred from English cases. In England the certificate of the Registrar is conclusive on the point in issue :

In re *Barned's Banking Company, Peels Case*, [1867] L. R., 2 Ch., App. Cas., 674

Oakes v. Tuquand, [1867] L. R., 2 Eng. & Ir. App., 325.

Selby v. Nettlefold, [1873] 43 L. J. (Ch.), 358.

In re *Nassan Phosphate Company*, [1876] L. R., 2 Ch. D., 610.

Ladies' Dress Association v. Pulbrook, [1900] L. R., 2 Q. B., 376.

[LORD MACNAGHTEN referred to Lindleys' Companies, 6th ed., Vol. I, p. 151.]

♦ The cases of

In re *Northumberland and Durham District Banking Company*, [1858] 5 De. G. & J., 357,

In re *National Debenture and Assets Corporation*, [1891] L. R., 2 Ch., 505,

In re *Laxon & Co*, [1892] L. R., 3 Ch., 555,

were distinguished. All doubts, if any, were, however, settled by the Legislature, which made the certificate conclusive. See

Companies Act, 1900, (63 and 64, Vict. ch. 48), s. 1; and Companies (Consolidation) Act, 1908, (8 Edw. 7 Ch., 69), s. 17.

Hassim Cassim Patail was appointed by the court on five separate applications to make five separate contracts on behalf of the minors. When he signs in five separate capacities, those signatures are five and not one.

C. M. Bailhache, K. C., and H. G. Snowden, for the respondents: The whole argument as to the conclusiveness of the certificate based on English case-law does not apply to that question raised under the Indian Companies Act. In England the contract of a minor is voidable and is good until it is set aside. And unless it is set aside the certificate is good. But in India the contract of a minor is void, and there being no contract the certificate cannot stand. The question of the competency to contract of the persons who form the Company is outside the jurisdiction of the Registrar, whose certificate, therefore, cannot affect the question. Before the Registrar can grant a certificate the condition precedent, that there must be seven different signatories to the memorandum, must be carried out. His certificate may remedy the omission to carry out a requisition, but it cannot be conclusive where a condition preceding is not satisfied. Here there are not seven different persons signing, that is contracting, and the certificate has no operation. The essential condition that seven different persons should sign the memorandum is not a mere requisition, but is a condition preceding. The matter was doubtful in England until it was put beyond doubt by section 17 of the Companies (Consolidation) Act, 1908. If the certificate were conclusive before that, what right had any one to inquire whether the signatories were minors or foreigners or whether the signatures were by seven or lesser number of persons? There was no necessity to make any such inquiry, as the matter could have been settled by putting in the certificate. But in

Princess of Reuss v. Bos, [1871] L. R., 5 Eng. and Ir. App. Cas., 176. the House of Lords inquired into the facts and decided the case on facts. The certificate is not conclusive.

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In re *National Debenture Assets Corporation*, [1891] L R 2 Ch., 505,
Solomon v. Solomon and Co., [1897] L. R. A. C., 22.

The last case is the latest case decided by the House of Lords that the certificate is not conclusive in all cases. There is no case decided since then laying down the contrary rule that the certificate is conclusive in all cases. The certificate of incorporation is not conclusive to prevent the objection that the memorandum was not signed by seven persons ;

In re *Laxon & Co.*, [1892] L. R., 3 Ch., 555.

The certificate is conclusive when there is something on which it can be authorized and that something is the memorandum and articles of association each signed by seven different persons. Cases relied on by the other side were distinguished and reference was also made to

Baroness Wenlock v. River Dee Company, [1888] L R, 38 Ch. D., 534.

Indian Companies Act, 1882, sections 6, 40 and 326; and

The Companies Act, 1862, (25 and 26 Vict. Ch. 89), sections 17 and 192.

The signature of a guardian to a memorandum of association purporting to be on behalf of an infant ward is in law the signature of the guardian only and not of the ward. The five signatures of the guardian amount only to one signature and the memorandum is not duly signed by seven or more persons as provided by the Companies Act.

The point now raised that there was not the proper number of persons who signed the memorandum was not raised in the former suit and was not decided then.

[LORD ATKINSON :—That suit was brought to set aside the deeds of April and May, 1902, and surely the question now raised might and ought to have been legitimately raised then. You said then that the Company was not existing for one thing, but you did not say that it was not existing for this reason that there was not a sufficient number of signatories to the memorandum.]

We did not say then that Company was not existing, the point there was that the Goolam Ariff Estates Company, Limited, was merely an *alias* of Goolam Ariff.

[MR. AMEER ALI :—You attacked the Company on two grounds, but you ought to have attacked it on the ground that there was no donee.]

We did not attack the Company in that case. We only said and did desire to say that Goolam Ariff had not parted possession as the Company and Goolam Ariff were the same.

[SIR JOHN EDGE :—You asked to set aside the deeds.]

That was a consequential relief. The subject of the formation of the Company might have been raised, but it was not raised and not dealt with. It was not a question which the respondents were bound to raise in that suit.

The withdrawal of the petition of 1904 does not bar the present suit. Sections 647 and 373 of Code of Civil Procedure, 1882, should be read together, and the word 'petition' should be substituted for the word 'suit' in the latter section, which would then bar a second petition under the Companies Act for the same purpose by the same person, but would not bar a suit.

Buckmaster, K. C., replied.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN :—The record in this case is more than ordinarily confused and the story is somewhat complicated. But for the purpose of this appeal the material facts may be stated in a few sentences.

One Hajee Goolam Ariff, a wealthy Mahomedan merchant, residing at Rangoon, being dissatisfied with the conduct of his two elder sons was minded to dispose of the bulk of his property for the benefit of his two junior wives and his five younger children, who were all minors at the time. With this object he applied for and obtained five separate orders under the Act of 1890 for the appointment of one and the same person as guardian of each of his minor children in order that the children by their guardian might accept the benefits which he intended to confer upon them. Being also desirous that his property should remain in one mass, intact and undistributed, he procured the registration of a limited Company called the Goolam Ariff Estate Company, Limited. To this Company in return for shares there was transferred so much of his property as was retained by

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him together with the undivided shares in his estate which he had conveyed to his junior wives and his minor children.

Hajee Goolam Ariff died on the 15th of May, 1902, having made his will on the 19th of the previous month. It was proved by his eldest son, Ebrahim Goolam Ariff; one of the executors therein named on the 23rd of June, 1902. From that time to the present there has been continuous and persistent litigation in which Ebrahim Goolam Ariff has endeavoured to set aside the disposition which his father made. In all these attempts Ebrahim Goolam Ariff failed except in his appeal in the present suit to the Chief Court of Lower Burma. On that appeal the order was made from which the present appeal to His Majesty has been brought.

The object of the present suit was to have it declared that the Goolam Ariff Estate Company, Limited, was not duly incorporated and that the property conveyed to the Company should be transferred "to the persons entitled to the same." The validity of the conveyances to the testator's junior wives and his minor children had been established in a suit, No. 146 of 1902, which ultimately came before this Board. But the validity of the incorporation of the Company had not been expressly determined.

The main grounds of the defence to the present suit were—

(1) that the certificate of incorporation of the Company was conclusive; and

(2) that the question raised by the suit was "*res judicata*."

The questions framed to meet these points were both answered by the Court of Appeal in favour of the plaintiff. In their Lordships' opinion both ought to have been answered in favour of the defendants, who are the present appellants.

In dealing with the first question their Lordships will assume that the conditions of registration prescribed by the Indian Companies Act were not duly complied with, that there were not seven subscribers to the memorandum of association, and that the Registrar of Companies ought not to have granted a certificate of incorporation. As a matter of fact, a certificate of incorporation was granted. In their

Lordships' opinion the certificate of incorporation is conclusive for all purposes.

The provisions of the Indian Companies Act of 1882 as regards the incorporation of companies are the same as those contained in the Imperial Act of 1862, except that it is specially provided in section 40 of the Indian Act that it is not the duty of the Registrar to require evidence as to whether the subscribers to the memorandum are competent to contract. Probably this provision was introduced because according to the Indian law the contract of an infant is not voidable but void, and it would lead to the endless confusion and expense if the Registrar were to take upon himself the duty of ascertaining whether the signatories to the memorandum were or were not of full age.

In England the question whether the Registrar's certificate is conclusive was decided so far back as 1867 by Lord CAIRN sitting in the Court of Appeal. *In Peel's case* ⁽¹⁾ after signature and before registration a proposed memorandum of association had been altered without the authority of the subscribers so materially that in the words of Lord CAIRNS, "the alteration entirely neutralised and annihilated the original execution and signature of the document." The Company, however, was registered and Registrar gave his certificate of incorporation. It was objected that the memorandum of association had not been signed by seven or indeed by any subscribers and that the provisions of the Act had not been complied with. To that proposition Lord CAIRNS assented. But "the certificate of incorporation," he said "is not merely a *prima facie* answer but a conclusive answer to such objection. . . . When once the certificate of incorporation is given nothing is to be enquired into as to the regularity of the prior proceedings." That was a plain and direct decision on the point. The observations of Lord CHELMSFORD in *Oakes v. Turquand*, ⁽²⁾ are to the same effect. "I think," said his lordship, "that the certificate prevents all recurrences to prior matters essential to registration, amongst which is the subscription of a memorandum of association by seven persons, and that it is

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(1) 2 Ch., 674

(2) L. R., 2, E. and I. Appeals, 325

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conclusive in this case that all previous requisites had been complied with." Undoubtedly Lord CAIRN'S decision has been cavilled at. For instance in *Re National Debenture Corporation*, (1) a judge of first instance declined to treat a certificate of incorporation as conclusive which had been, as was supposed, subscribed by six persons only. On appeal, however, further evidence was admitted and it was found that the memorandum had in fact been subscribed by seven persons only. On that ground the Court of Appeal reversed the decision appealed from. But unfortunately the learned Judges of appeal made some observations to the effect that if the learned Judge had been right as to the facts his decision in point of law would have been correct. The observations were mere dicta and besides the Court of Appeal could have had no jurisdiction to reverse Lord CAIRNS' decision. In their Lordships' opinion that decision is of unquestionable authority untouched by any subsequent decision and unimpaired by any dictum in any superior court, although the legislature thought fit no doubt for good reasons to set the matter at rest by the Imperial Act of 1900, which put the words of Lord CAIRNS and Lord CHELMSFORD in a legislative enactment repeated in the Imperial Act of 1908.

Their Lordships are prepared to go further and to say that, in their opinion, even if there were no authority to guide their decision, the matter would seem to them to be absolutely plain on the words of the Act. The use of the word "otherwise" in section 6 shows that the statutory condition that the memorandum of association must be signed by seven persons is as much a condition of registration as any other requisition to be found in the Act which is preliminary to registration, and apparently essential.

This view is sufficient to determine the case in favour of the appellants, but inasmuch as the question of *res judicata* was very fully argued, their Lordships do not think it right to abstain from dealing with it.

Section 13 of the Code of Civil Procedure of 1882 enacts that :—

"No court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in a

(1) [1891] 2 Ch., 505.

former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."

Then Explanation 2 of that section declares that :—

"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

It was admitted by the learned counsel for the respondents that the alleged invalidity of the incorporation of the Goolam Ariff Estate Company, Limited, might have been made a ground of attack in the suit No. 146 of 1902, in which the validity of the dispositions made by Hajee Goolam Ariff was attacked.

That it ought to have been made a ground of attack in that suit appears to their Lordships to be equally clear. All the facts on which the present suit is based were known to the plaintiff and are stated at length in the proceedings of the former suit. No further evidence would have been needed. Nothing was wanting but the addition of an issue on the point. The case is plainly within the ruling of this Board in the case of *Kameswar Pershad v. Rajkumari Ruttunkoer*⁽¹⁾.

Their Lordships, therefore, think that the question raised in the present suit is *res judicata*, and on that ground as well, as on the ground that the certificate of incorporation is conclusive, their Lordships think that the suit fails and ought to be dismissed.

Their Lordships are, therefore, of opinion that the appeal ought to be allowed and the suit dismissed with costs both here and below, and their Lordships will humbly advise His Majesty accordingly.

Bramall and White, Solicitors for the appellants.

A. H. Arnould and Son, Solicitors for the respondents.

J. M. P.

Appeal allowed.

(1) [1892] 19 I. A., 234.

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1912.

Moosa Goolam
Ariff

v.

Ebrahim
Goolam Ariff.

Lord

Macnaghten.

CIVIL.

1912.

November, 11.

BANERJI, J.

BALLA MAL AND ANOTHER

versus

CHUNNI LAL.*

Specific Relief Act (I of 1877), section 22—Specific performance of contract—Circumstances under which performance may be refused.

Where in a suit for specific performance of a contract the circumstances under which the contract is made are such as to give the plaintiffs an undue advantage over the defendant, though there may be no fraud, and where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff, *held* that the court should exercise its discretion and refuse to grant specific performance of the contract *Shib Lal v. The Collector of Bareilly*, 16 All., 423, referred to.

SECOND APPEAL from a decree of Babu Baidya Nath Das, Subordinate Judge of Bareilly, affirming a decree of Babu Aghore Nath Mukerji, Munsif.

Suit for specific performance of a contract.

The material facts of the case are contained in the judgment.

M. L. Agarwala, for the appellants:—The agreement may be onerous, but it is not unconscionable. The parties entered into the contract with full knowledge of what they were agreeing upon. They were on equal terms, and no unfair advantage was taken over the defendant; much less was there any fraud or mis-representation. I rely on

Shib Lal and others v. The Collector of Bareilly, [1894] 1. L. R., 16 All., 423; at pp. 432, 433.

G. W. Davis v. Maung Shwe Go, [1911] 15 C. W. N., 934, P. C.; at pp. 944, 945.

The illustrations to section 22 of the Specific Relief Act contemplate cases in which some material fact was known to one party and concealed from the other, or which the other could not foresee. There are no such circumstances in the present case.

* S. A. No. 868 of 1911

S. C. Banerji, for the respondent:—An objection to specific performance on the ground of hardship is totally different from one on the ground of fraud.

Fry on Specific Performance, 5th Ed., p. 195 ; 209

Having regard to the findings, the case comes within section 22, clause II of the Specific Relief Act. The words used there are "which he did not foresee" and not "could not foresee". The question is not of fraud or of means of knowledge, but is whether, as a matter of fact, the defendant failed to foresee the hardship. A concealment, or the taking of undue advantage, on the part of the other party is not a necessary ingredient. Defendant's failure to foresee may be solely due to mere forgetfulness on his part, as in illustration (e). Illustration (j) comes near the present case. The lower court has exercised its judicial discretion in refusing specific performance. There exist no special reasons in this case for disturbing the lower court's exercise of discretion.

The following judgment was delivered by

BANERJI, J.—This suit is, in substance, one for specific performance of a contract embodied in a document executed on the 25th of January, 1910. The parties owned certain house property jointly. Under an award made in 1861, a portion of this property was partitioned, but some of it still remained joint. It is said that under the contract in question it was agreed that the property which had remained joint should be divided in the manner provided for in the document. On the basis of this agreement the plaintiffs brought the suit out of which this appeal has arisen and claimed the reliefs set forth in the plaint. The facts of the case are fully stated in the judgment of the Munsif. He dismissed the suit on the ground that the agreement of the 25th of January, 1910, was entered into by the defendant without a full knowledge of its contents and that it was not binding on him. He, also, came to the conclusion that the contract made in that document gave the plaintiffs an unfair advantage and that the performance of it would cause undue hardship to the defendant. The lower appellate court affirmed the decision of the first court not on the ground that the contract was not entered into by the defendant with full knowledge

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of the circumstances, but on other grounds mentioned in the judgment. I gave the parties an opportunity of compromising the case, but nothing was done. I referred certain issues to the court below by my order, dated the 3rd of May, 1912. It has been found by the lower appellate court that the defendant executed the document of the 25th of January, 1910, with full knowledge of its contents, but the learned Subordinate Judge has found that this document confers undue advantage on the plaintiffs and causes a hardship to the defendant which was not anticipated at the time when the document was executed. These findings must be accepted in this appeal.

Section 22 of the Specific Relief Act provides that a court is not bound to grant specific performance merely because it is lawful to do so, but has a discretion in the matter, and clauses (1) and (2) of the section provide that if the circumstances under which the contract is made are such as to give the plaintiffs undue advantage over the defendant, though there may be no fraud, and where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff, the court should exercise its discretion and refuse to grant specific relief. In view of the findings in this case the plaintiffs gained undue advantage. Certain portions of the property which have been found to belong to the defendant would go under the deed to the plaintiffs. The closing of the door which now exists and the opening of another door in that portion which is in front of the defendant's *sehdari* would cause great hardship to the defendant, which he did not foresee at the time. The opening of the door at that place might lead to considerable litigation between the defendant and Musammam Ram Kali. The present case is very similar to those mentioned in some of the illustrations to section 22, for sample, illustrations (e), (h) and (j). Having regard to the findings at which the courts below have arrived, there was unfairness and inequality in the contract and as the plaintiff would still have the right to obtain partition these courts were justified, under the circumstances, in exercising the discretion vested in them under section 22 of the Specific Relief Act. The learned counsel

for the appellants referred to the case of *Shib Lal v. The Collector of Bareilly* ⁽¹⁾. That case has reference to its own peculiar circumstances, and there is no general proposition of law laid down in it which would help the appellants. I do not think I should be justified in interfering with the discretion vested in courts below under section 22, which they have exercised not arbitrarily but on reasonable grounds. I dismiss the appeal with costs.

B. K. M.

Appeal dismissed.

(1) [1894] I. L. R., 16 All., 423.

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MASIH-UD-DIN

versus

BALLABH DAS.*

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1912.
November, 11.
GRIFFIN, J.
CHAMIER, J.

Mahomedan Law—Waqf—Dedication of property by a person subsequently found not to be its true owner—No ratification by true owner—Dedication not conveying any rights to the waqf in respect of an indemnity bond concerning the property—Right to sue—Suit brought as waqf not allowed to be treated as one by an heir—Practice.

Certain property was purchased by A who got an indemnity bond executed, guaranteeing the title of his vendors. A made a *waqf* of the property after which on a claim made by a third party the property was declared not to be A's vendors and passed out of A's possession. After A's death, A's son as *mutawalli* sued on the indemnity bond. Held (*per* GRIFFIN, J.,) that under the Mahomedan law the *waqf* of property of which the person making it was not the true owner and the dedication not being ratified by the true owner was not valid, and the plaintiff had no right to sue.

(*Per* CHAMIER, J.)—That as A. had not mentioned or in way referred to the indemnity bond in the *wafqnamah* the plaintiff as *mutawalli* had no right to sue.

Held further (GRIFFIN and CHAMIER, JJ.) that in the appellate court the plaintiff should not be allowed to convert the suit by him as *mutawalli* into a suit by him as one of the heirs of A.

FIRST APPEAL from a decree of Lala Achal Behari Subordinate Judge of Banda.

* F. A. No. 214 of 1911.

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v.
Ballabh Das.

By a sale deed, dated the 12th November, 1889, Seth Kishan Chand and Gokul Chand sold the village Lasra to Sheikh Abdullah and on the same date the former executed an indemnity bond to the effect that in case the village sold went out of the hands of the vendee for want of a clear title of the vendors, the former would pay back the price together with damages to the latter, and as a security for the due performance of that agreement mortgaged certain villages to Abdullah. On 22nd May, 1897, Abdullah made a *waqf* of the village Lasra and himself became a *mutawalli*. On his death his son, the plaintiff in this case, became *mutawalli* and, as such, became mortgagee of the property under the agreement of the 12th November, 1889. There was some litigation with respect to Lasra with the result that for want of title in the vendors it went out of the hands of the plaintiff (under a decree of the High Court), on 11th May, 1906. He was held also liable to pay mesne profits and costs. The plaintiff, therefore, sued to enforce the indemnity bond.

The defendants pleaded *inter alia* that the plaintiff as *mutawalli* was not entitled to sue as the mortgagee inasmuch as the rights arising under the indemnity bond were not included in the *waqf*. It was further pleaded that Abdullah having acquired no clear title in the village Lasra, could not make a valid *waqf* of that property and the indemnity bond was without consideration.

The Subordinate Judge dismissed the suit holding that the sale was *void ab initio*, there was no valid *waqf*; the *waqf* did not include the indemnity bond and there was no separate legal consideration for the bond.

The defendants appealed.

Jogendra Nath Chaudri (with him Rahmatullah), for the appellant, contended that Abdullah, when he became a *mutawalli*, could himself enforce his rights under the indemnity bond. He had in him vested all the rights arising out of that bond. In this case it could not be said that those rights did not pass to the plaintiff. He cited

Transfer of Property Act, section 55(2).

The subject-matter of the *waqf* must belong to the owner of the property and in this case it did belong to him under

the sale deed. These rights would pass because there was a clear intention that they should. The reservation of such a right would clearly be inconsistent with the intention of the *waqf*. The extinction of his own rights was absolute. The *waqf* attached to the money. It was for the benefit of the *waqf* that the suit had been brought. The second position of the appellant was that if he could not enforce the indemnity bond as a *mutawalli*, he should be permitted to enforce it as one of the heirs of Abdullah as a personal claim.

Sunder Lal, Motilal Nehru, Durga Charan Banerji and Uma Shanker Bajpei, for the respondents, were not called upon.

The following judgments were delivered :—

GRIFFIN, J.—This appeal arises out of a suit to enforce a claim under an indemnity bond executed in favour of one Abdullah by Kishen Chand and Gokul Chand on the 12th of November, 1889. On that date Kishen Chand and Gokul Chand executed a sale deed of a village named Lasra, in favour of Abdullah. The latter apparently had some doubts as to the validity of his vendors' title, for, on the same date, he took from his vendors an indemnity bond the conditions of which have given rise to the present suit. By this indemnity bond the vendors undertook to make good to Abdullah the sale price together with any loss he might sustain on account of any defect of title in the property conveyed by the sale-deed. Apparently, Abdullah entered into possession of the property sold and remained in possession until the 27th of May, 1897, when he made a dedication of this village along with others for certain religious purposes. Under the *waqfnamah* he appointed himself the first *mutawalli* and nominated his son, the appellant before us, his successor. In the life-time of Abdullah, Musammat Naraini appeared as a claimant of the ownership of the village, Lasra. She was the adoptive mother of one, Ram Gopal, a nephew of Abdullah's vendors. Her suit was decreed by this Court on the 21st of December, 1905, and Musammat Naraini obtained possession of the village Lasra in May, 1906. This suit was instituted on the 3rd of August, 1910, to recover a sum of Rs. 52,000 on account of the price of the village, Lasra, and

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the loss incurred by the plaintiff owing to the village having passed out of his possession. The defendants 1 to 5 are transferees from the vendors of Abdullah of the village hypothecated under the indemnity bond mentioned above. Musammat Naraini, the sixth defendant, is the person who, under a decree of this Court, obtained possession of the village Lasra. The defendants 7, 8 and 9 are representatives of the vendors. They have not appeared to defend the suit and no relief was asked as against them. Abdullah died during the pendency of the appeal, in this Court, in the suit brought by Musammat Naraini, and his son, who is the appellant here, was brought on the record as his representative. The present suit was defended on various grounds and we are concerned here with two only. The lower court has upheld the contention of the defendants; first, that the *waqf* is invalid and, therefore, the plaintiff is not entitled to maintain the suit, and secondly, that Abdullah, the vendee at the time he created the *waqf*, did not at the same time convey to the *mutawalli* his rights under the indemnity bond. In appeal, it is contended that the court below was wrong in holding that the *waqf* was invalid and that the plaintiff has no right to maintain the suit because the *waqfnamah* contained no mention of a conveyance to the *mutawalli* of the vendee's rights under the indemnity bond. It is, further, contended that if the present suit cannot be maintained by reason of any defect in the plaintiff's position as *mutawalli*, he ought to be allowed to continue the suit as heir of the vendee, Abdullah. This Court in its decision of the 21st December, 1905, held that the sale to Sheikh Abdullah was not a valid sale and that Abdullah was not a *bona fide* purchaser under that sale. The Muhammedan law on the subject of *waqf* which it is necessary to refer to in this case will be found at page 134 of Amir Ali's Muhammedan law, Volume I. "The subject-matter of the dedication must be the property of the *waqif* at the time the *waqf* is made, that is, he must be in a position to exercise dominion over it. Consequently, if a *waqf* is made by a person of some property of which he is in unlawful possession, but which he, subsequently purchases from the rightful owner, such *waqf* is invalid. So also, when a man makes a *waqf* for certain good purposes of land belonging to another, and then becomes

the proprietor of it, the *waqf* is not lawful, but it would become validly dedicated if ratified by the proprietor. Accordingly, when a person purports to make a *waqf* of property which does not belong to him, and such *waqf* is subsequently ratified by the true owner, the dedication is valid." Here, it will be seen that Abdullah made a dedication of certain property of which he was not the true owner. There has been no ratification of the *waqf* by the true owner, and I am not satisfied that according to the Muhammedan law as set out above, the so-called *waqf* so far as the particular village Lasra was concerned was vaild. I agree, therefore, with the lower court in dismissing the plaintiffs' suit on that ground. I do not consider it necessary to go into the second ground as to what was the exact intention of Abdullah in regard to his rights under the indemnity bond at the time he executed the *waqfnamah*. As to the plea advanced on behalf of the appellant that he should be permitted to continue the suit in his capacity as heir of the deceased, Abdullah, I do not think that the request is one which should be acceded to at this stage of the case. It is not pretended that the plaintiff is the one and only heir of Abdullah and I am not prepared at this stage of the case to allow the plaintiff to continue the suit in an entirely different capacity. In my opinion the suit was rightly dismissed by the court below, and I dismiss this appeal with costs.

CHAMIER, J. :—I agree that the appeal should be dismissed, but I should prefer to rest the dismissal of the appeal on the ground that even if the *waqf* was valid, the plaintiff has no right to sue on the deed of indemnity as *mutawalli* of the *waqf*. The right to sue on that deed does not appear to have been transferred to the *mutawalli* for the time being. Under the *waqfnamah*, Abdullah abandoned his title to mauza Lasra, but did not mention or in any way refer to the deed of indemnity. The right to sue on that deed is not appertenant to the interest of Abdullah in mauza Lasra and did not pass to the *mutawalli* for the time being under section 8 of the Transfer of Property Act or under any other provision of which I am aware. If it was intended that the *mutawalli* for the time being should have the right to sue on the deed of indemnity, I can only say that, in my opinion, no such

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intention has been expressed in the *wagfnamah*. I agree that the plaintiff should not, at this stage, be allowed to convert the suit by him as *mutawalli* into a suit by him as one of the heirs of Abdallah.

By THE COURT :—The appeal is dismissed with costs so far as defendants 1 to 5 are concerned.

B. N. G.

Appeal dismissed.

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 1912.
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 19.
 GRIFFIN, J.
 CHAMIER, J.

ALLAH DAD KHAN AND OTHERS

versus

SANT RAM AND OTHERS.*

Succession Certificate Act (VII of 1889), sections 4 and 16.—Assignment of the debt by the holder of succession certificate—Right of the assignee to one for the debt—Practice—Assignee not allowed time to produce a fresh certificate.

B. A., who was the mortgagee of the property in suit died leaving behind him F. A. and others as his heirs. F. A. got a succession certificate with regard to the mortgage in suit and assigned the mortgage to the plaintiff, together with his right to sue as a holder of the succession certificate. *Held* that the plaintiff had no right to maintain the suit as he did not hold a succession certificate.

Held, further, that he could not be allowed to convert the suit brought by him as an assignee of the debt into one by a certificate holder by allowing him an opportunity to produce a succession certificate.

FIRST APPEAL from the decree of Pandit Pitambar Joshi, Second Additional Judge of Moradabad.

Suit upon a mortgage.

The facts, so far as they are material to this report, were these :—Bahadur Khan was the original mortgagee. He died leaving Farzand Ali and others as his heirs. Farzand Ali obtained on 25th August, 1900, a certificate under the Succession Certificate Act for the collection of the mortgage debt due to Bahadur Khan. On 15th March, 1904, Farzand Ali assigned the mortgage-debt to Sahu Sant Ram together with his right

* F. A. No. 43 of 1912.

to sue for the same, and made over to the assignee the succession certificate which he had obtained. The assignee brought a suit, on the strength of that assignment, for enforcement of the mortgage. He did not produce any succession certificate empowering him to collect the debt due to Bahadur Khan, but produced the one which was granted to Farzand Ali. The defence, *inter alia*, was that the certificate granted to Farzand Ali could not be acted upon by his assignee. This objection was overruled and the suit decreed.

Defendants appealed.

Motilal Nehru (with him *Nawab Abdul Majid*), for the appellants :—The plaintiff cannot get a decree except on the production of a succession certificate granted to himself. Section 4 of the Succession Certificate Act is imperative. It has been definitely ruled that the section applies to mortgage debts as well as to simple money debts. The law does not recognize an assignment of a succession certificate ; the right granted by such a certificate is a purely personal one, confined to the grantee thereof. To recognize such assignments would be to defeat the object of the Succession Certificate Act, which is to protect the debtor against the worry and uncertainty arising from disputes relating to the claimant's title. Section 16 of the Act indemnifies payments only when they are made to the person to whom the certificate has been granted. The plaintiff, by obtaining an assignment from the certificate-holder, of his right to sue, cannot be deemed to have fulfilled the requirements of section 4.

B. E. O'Connor (for *Muhammad Ishaq*), for the respondents :—The requirements of section 4 have been complied with, inasmuch as a succession certificate covering the debt sued for has been produced. The section does not expressly require that the certificate should have been granted to the plaintiff personally, though in the case of a probate or letters of administration there is a distinct provision that the latter should have been granted to the plaintiff. The omission from clause (iii) of the words "to him" which occur in clause (i) is significant. There is nothing to prohibit the assignment of the rights under a succession certificate together with an assignment of the debt itself. The recognition of such an assign-

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ment would not go against the objects of the Succession Certificate Act. The fiscal object would, in no way, suffer, as a certificate, in the first instance, would still be necessary. And where the debt together with the right of collection thereof granted by a succession certificate are assigned, there arises no question of involving the debtor in vexatious disputes relating to the title of rival claimants. In this case the assignee is substituted for the original grantee of the certificate and the protection against the demands of rival claimants remains unaffected. None of the objects of the Act is, therefore, frustrated.

Should a fresh certificate be deemed necessary the plaintiff may now be given an opportunity of obtaining and producing it.

Motilal Nehru, replied.

The judgment of the Court was delivered by

Chamier, J.

CHAMIER, J.—This was a suit upon a mortgage made in favour of one Bahadur Khan by two persons who are now represented by the appellants and others. Bahadur Khan died leaving a son, Farzand Ali, and other heirs. Farzand Ali applied for a succession certificate in respect of several debts due to his father. Some of the other heirs stated that they had relinquished their rights in his favour and a certificate was issued to Farzand Ali who, some years later, assigned the mortgage debt together with his right to sue for the same to the respondent, Sant Ram. It is, on the strength of that assignment, that the present suit was brought. The claim was resisted upon several grounds, one of which was that Farzand Ali was not competent to transfer to another the right conferred upon him by the succession certificate to sue for the recovery of the debt. The court below decided this and other questions against the appellants. Hence this appeal.

Apart from the provisions of the Succession Certificate Act, Farzand Ali, as one of the heirs of Bahadur Khan, could have sued upon the mortgage making as defendants the heirs of Bahadur Khan who declined to join as plaintiffs. He could also have assigned his interest in the mortgage to the respondent, Sant Ram. Indeed, the assignment in favour

of Sant Ram may be regarded as having transferred to Sant Ram all Farzand Ali's rights under the mortgage, although the assignment purports to have been made by Farzand Ali as holder of the succession certificate. But section 4 of the Succession Certificate Act provides that no court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of a deceased person or to any part thereof, except upon the production by the person so claiming of a certificate granted under that Act or of one or other of certain other documents, which admittedly have not been produced in this case. It has been held by this Court in many cases, which we are bound to follow, that a debt secured by a simple mortgage is a debt within the meaning of the provision just quoted. A certificate under the Succession Certificate Act has been produced, but it is in favour of Farzand Ali. The question is whether such a certificate is sufficient. The Act does not in so many words say that the certificate must be one in favour of the plaintiff, but we think that that is the meaning of the provision. The declared object of the Act is to facilitate the collection of debts on successions and to afford protection to parties paying debts to the representatives of deceased persons. Section 16 of the Act protects a debtor of a deceased person who pays the debt in good faith to the *person to whom the certificate was granted*. An assignee of the person to whom the certificate was granted does not appear to come within the section. From this it would appear that the person to sue for the debt is the person to whom the certificate was granted. Notwithstanding the preamble to the Act, one of the objects of the Act seems to have been to prevent people from evading payment of the duty payable on certificates issued under Act 27 of 1860. If that had been the sole object of the legislature, there would have been much to say for the view taken by the court below. But the main object must be taken to be that stated in the preamble. The Act is designed to enable debtors to know with certainty the person to whom they can safely pay a debt due to a deceased person. If we were to hold that any person may sue for the recovery of a debt due to a deceased person provided that he produces a certificate having the debt specified in it,

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the debtor would have to trace the title of the plaintiff and we should re-introduce the confusion which the Act was designed to remove. If the plaintiff relies upon a grant of probate or letters of administration, he must show that the grant was made to him, and we see no reason why it should be otherwise in the case of a succession certificate. The result is that the plaintiff, in our opinion, was not entitled to maintain this suit.

It was suggested that we might adjourn the case in order that the plaintiff might apply for a certificate. We cannot allow this as the plaintiff cannot be permitted to convert a suit by him as assignee of Farzand Ali into a suit by him as holder of a certificate authorising him to collect debts due to Bahadur Khan. The appeal is allowed and the suit is dismissed with costs.

B. K. M.

Appeal allowed.

CIVIL.

1912.

November, 15.

RICHARDS, C.J.
BANERJI, J.

KARTA KISHEN

versus

HARNARAIN CHAND.*

Registration Act (XVI of 1908), section 32—Presentation by a servant of the mortgagor in the presence of mortgagor—Presentation valid.

Where a mortgage-deed is handed over to the sub-registrar by a person other than the mortgagor in the presence of the mortgagor at the time of registration the mortgagor is present assenting to the registration of the document with full knowledge of what was being done in the office of the sub-registrar, *held* that the presentation is a valid presentation within the meaning of section 32 of the Registration Act.

Natha Mal v. Abdul Wahid Khan, 34 All., 355, followed

Mujib-un-nissa v. Abdul Ruhim, 23 All., 233, distinguished

Jamba Prasad v. Aftab Ali Khan, 34 All., 331, not followed.

SECOND APPEAL from a decree of W. D. Burkitt, Esq., District Judge of Saharanpur, confirming a decree of Maulvi Muhammad Shafi, Subordinate Judge.

* S. A. No. 51 of 1912.

The facts of the case appear from the judgment.

Suit upon a mortgage.

The courts below dismissed the suit.

Plaintiff appealed.

Nehal Chand (with him *Jogindro Nath Chaudri* and *A. P. Dube*), for the appellant.

B. E. O'Connor, for the respondent.

The judgment of the Court was delivered by

RICHARDS, C. J.—The only question which has been argued in this appeal is whether or not the mortgage sued upon was duly presented and registered in accordance with the provisions of the Indian Registration Act. The document was in fact registered. It has an endorsement that it was “presented” for registration in the office of the sub-registrar. Below this is the name of a person which is variously read as Santh, Nanha, Natha, or Sehua. He is described as the servant of the mortgagee. The mortgagor in answer to the interrogations served upon him admits that he was present when the document was being registered and when it was handed over to the sub-registrar. He cannot remember apparently who actually handed over the document but he says that some person whose name, probably, was Santha, handed over the document. It is clear, however, from the admitted facts in the case that at the time of registration the mortgagor was present assenting to the registration of the document, with full knowledge of what was being done in the office of the sub-registrar. The real question for consideration is whether or not these circumstances amount to a “presentation” within the meaning of section 32 of the Indian Registration Act. Both the courts below have dismissed the plaintiff’s suit on the preliminary point that the mortgage was not duly “presented” for registration. There has been some conflict of authority on this question and the point was very fully argued recently before a Full Bench of the court, but unfortunately no decision was pronounced by the court on the question now before us, the case turning on another point. In the case of *Nath Mal v. Abdul Wahid Khan*(¹), a case in which the facts

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 Richards, C. J.

were very similar to those of the present case, it was decided that where a person who was authorised to "present" a document for registration was present assenting to the registration, the mere fact that his was not the hand to give the document to the sub-registrar did not prevent the document being regarded as duly "presented" within the meaning of the section. No doubt a somewhat contrary view was taken in the case of *Jamba Prasad v. Aftab Ali Khan*⁽¹⁾. We think under all the circumstances we are entitled to consider the question on its merits without feeling bound by authority particularly as we have had so recently the benefit of the very full arguments advanced in the Full Bench case to which we have referred.

The Privy Council decision in the case of *Mujib-unnessa v. Abdul Rahim*⁽²⁾, has in our opinion no application to the circumstances of the present case. In that case the person who presented the document had been the attorney of a deceased person who wished to execute and register a deed of *waqf*. Before the document was presented for registration the donor of the power of attorney had died. Consequently the person presenting the document for registration had no authority from any one to present the document, nor was there any other person present who could have legally "presented" the document for registration. We think that the remarks of their Lordships in this case must be read and understood in connection with the facts of the case which were before them.

After full consideration we see no reason to depart from the view which we expressed in the case of *Nath Mal v. Abdul Wahid Khan*⁽³⁾.

We, accordingly, allow the appeal, set aside the decree of both the courts below and remand the case to the court of first instance, through the lower appellate court, with directions to readmit the case upon its original number in the file, and proceed to hear and determine the same according to law. Costs here and heretofore will be costs in the cause.

(1) [1912] I. L. R., 34 All., 331. (2) [1901] I. L. R., 23 All., 233.

(3) [1912] I. L. R., 34 All., 355.

Appeal allowed.

GAURI RAI AND OTHERS

versus

MANOHAR TELI AND OTHERS.*

CIVIL

1912.

November, 19.

GRIFFIN, J.

* *Agra Tenancy Act (II of 1901, U. P.), section 202—Not applicable to cases where the revenue court decision will have no effect in the decision of the civil court.*

The provisions of section 202 of the Agra Tenancy Act have no application where the decision on the question that may be remitted to the revenue court will have no effect on the decision of the civil court.

SECOND APPEAL against the decree of F. D. Simpson, Esq., District Judge of Gorakhpur, confirming the decree of Babu Kashi Prasad, Munsif, Bansgaon, district Gorakhpur.

Suit for redemption and mesne profits.

The father of one of the plaintiffs had usufructuarily mortgaged plots No. 358, 181 and 419 to the father of the defendants in 1289 Fasli. In 1298 Fasli, this mortgage was renewed. Plot No. 419 was excluded from this mortgage. Plot No. 358 was mortgaged for Rs. 100 and plot No. 181 was verbally mortgaged for Rs. 15. Ever since the mortgage, the father of the defendants and after his death, the defendants have been in possession over the plots mortgaged. The plaintiffs alleged that they had deposited under section 83, Transfer of Property Act, the mortgage money in court on 25th May, 1910, but the defendants refused to accept the amount. Hence the suit was filed for redemption and mesne profits. The main pleas in the defence were that the amount in lieu of which plot No. 181 was mortgaged was Rs. 58 and not Rs. 15, as alleged by the plaintiffs, and that the defendants were in possession of plot No. 358, not as mortgagees, but as tenants. The court of first instance decreed the claim for redemption of plot No. 181 but dismissed the claim in respect of plot No. 358, holding that the defendants were not in possession of it as mortgagees for there was no valid mortgage.

* S. A. 558 of 1912.

CIVIL.

1912.

Gauri Rai
v.
Manohar Teli.

The plaintiffs appealed to the District Judge in respect of plot No. 358. He held, "there is no mortgage and plaintiffs cannot redeem. If they have any other title they can sue on it now that it is ascertained that there is no mortgage". He dismissed the appeal.

Plaintiffs appealed.

Jang Bahadur Lal (for *Haribans Sahai*), for the appellants, submitted that inasmuch as the defendants pleaded that they held plot No 358 as tenants, the lower courts should have, according to section 202 of Act No. II of 1901, of the Agra Tenancy Act, required the defendant to institute a suit in the revenue court for the determination of the question of tenancy.

He referred to

Jagan Nath v. Bhawani and another, [1904] 1. L. R., 27 All., 167.

Iswar Saran (for the respondents), submitted that section 202 of the Agra Tenancy Act would apply to a case where the decision by the revenue court on a question of tenancy would affect the result of the suit pending in the civil court. If the determination of the question of tenant-right by the revenue court produced no such result, the section was inapplicable. Plaintiffs want to redeem a mortgage but both the courts below hold that there is no mortgage. The suit must fail whether the defendants are tenants or not.

Jang Bahadur, was heard in reply.

The following judgment was delivered by

Griffin, J.

GRIFFIN, J.—The appellants in this case alleged that they were the occupancy tenants of two plots Nos. 358 and 181, and that they had mortgaged these plots by two separate mortgages to defendants. They sued for redemption. The suit has been decreed with regard to plot No. 181, but it has been dismissed by both the courts below with regard to plot No. 358. The lower appellate court finds as a fact that there was no legal mortgage over this plot, inasmuch as the mortgage alleged was for a sum of over Rs. 100 and the document was not registered. The plaintiffs come in second appeal to this Court. The defendants had denied the existence of a mortgage over plot No. 358 and alleged that they were the

sub-tenants of the plaintiffs in respect of that plot. It is contended in second appeal that in view of the findings of the defendants it was incumbent on the courts below to require the defendants to institute a suit in the revenue court within three months for a determination of the question whether or not they were the tenants of plot No. 358. The provisions of section 202 of the Tenancy Act lend support to this plea. The suit was one relating to an agricultural holding instituted in a civil court and the defendants pleaded that they held the land as the tenants of the plaintiffs. In the memorandum of appeal to the court below one of the grounds taken was that the defendants should have been required to institute a suit in the revenue court for the determination of their status. The plea was not noticed in the judgment of the court below. The second paragraph of section 202 sets out that "if the defendant fails to comply with the order, the court shall decide the question against him." We have to see what would be the result if the defendants failed to institute a suit in the revenue court. The decision of the court upon the plea would be that the defendants had failed to prove that they are the tenants of the plot in suit. That decision would not help the plaintiffs, as on the suit as framed they had failed to prove the existence of a mortgage. If, however, the procedure required by section 202 of the Tenancy Act had been carried out and the defendants had instituted a suit in the revenue court, it would have been the duty of the civil court to dispose of the suit according to the decision of the revenue court. Again, we have to see what would be the decision if the court held that the defendants were tenants, and (2) if it held that they were not tenants. In either alternative the plaintiffs could not get a decree in respect of plot No. 358, inasmuch as they failed to prove the mortgage sued upon. It would, therefore, appear that the question remitted to the revenue court for decision must be a vital question in the case and where, as in this case, the decision of the revenue court would have no effect on the decision of the civil court, the provisions of section 202, in my opinion, have no application. The appeal is dismissed with costs.

CIVIL

1912.

Gauri Rai

v.

Manohar Teli.

Griffin, J.

CIVIL.

1912.

November, 19,

RAFIQ, J.

KATWARU CHAMAR AND OTHERS

VERSUS

RAM ADHIN UPADHIA.*

*Transfer of Property Act (IV of 1882), section 3—Immoveable property—
Fruit trees growing timber.*

Certain fruit bearing trees were mortgaged along with other immoveable property, *held* that they fall within the definition of immoveable property as defined in the Transfer of Property Act and are liable for sale as such.

SECOND APPEAL from a decree of Pandit Kanhaya Lal, District Judge of Jaunpur, modifying a decree of Munshi Harihar Prasad, the City Munsif.

The facts of the case appear from the judgment of the Court.

S. M. Ahmad Kareem, for the appellants.

Gokul Prasad for the respondent.

The following judgment was delivered by

Rafiq, J.

RAFIQ, J.—Katwaru Chamar, one of the defendants-appellants, executed a hypothecation bond in favour of Ram Adhin on the 20th of June, 1890, in lieu of Rs. 80. The property hypothecated in the bond was as follows :—1 bigha, 19 biswas of occupancy holding, (2) 4 mango trees, (3) 6 bamboo clumps, (4) 4 *mahua* trees, (5) 2 plum trees, (6) 1 *kathal* tree, (7) 2 *nim* trees, (8) 4 *babul* trees, (9) a *pucka* well, and (10) a *kolhu*.

On the 5th of August, 1910, Ram Adhin and his minor son, Ram Chand, instituted a suit in the court of the Munsif of Jaunpur against Katwaru Chamar and his sons and grandsons for recovery of the mortgage money by sale of the hypothecated property. The claim was resisted on two grounds, namely, (1) that no consideration had passed on the bond in suit, and (2) that the claim was barred by limitation. The Munsif found that the bond in suit was for consideration, but he held that the claim was barred with regard to trees and the sugar-pressing machine. He, conse-

* S. A. No. 646 of 1912.

quently, exempted from sale the trees and the machine. On appeal by Ram Adhin, the learned Judge modified the decree of the first court by holding that the fruit-trees were liable to sale in execution of the decree of the plaintiffs-respondents inasmuch as they fell within the definition of immoveable property. Katwaru and his sons and grandsons have come up in second appeal to this Court. It is contended on their behalf that the fruit trees do not necessarily come under the definition of immoveable property, that the character of fruit trees depends upon local custom and that it was for the plaintiff-respondent to have shown that the fruit trees in suit were hypothecated to him as immoveable property and not as growing timber. In support of this contention the case of *Krishnarao v. Babaji*(¹), is relied upon. I do not agree with the learned counsel that it was for the plaintiff-respondent to prove a local custom as to the character of the fruit trees. On the contrary, I think it was for the defendants-appellants to set up and prove a local custom, if any, with regard to the fruit trees as supporting their plea of limitation. A fruit tree does not necessarily fall under the definition of growing timber as remarked in the case of *Krishnarao v. Babaji*. I agree with the finding of the lower appellate court that the fruit trees in suit fall within the definition of immoveable property. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) [1889] I. L. R., 24 Bom., 31.

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Katwaru
Chamar

vs.
Ram Adhin
Upadhia.

Rafiq, J.

CIVIL.

1912.

November, 22

ROHAN SINGH

versus

AHSAN BEGAM AND ANOTHER.*

CHAMIER, J.

Right to sue—Suit for possession by some of the owners against a trespasser—Plaintiff owner of specific shares—Decree limited to plaintiff's share only.

Where in a suit for possession of a grove as heirs of the last owner, the plaintiffs have definite shares of which they can be given possession, they are entitled to possession of those shares only and not the whole grove. *Mannu v. Nasrat-ullah*, [1901] A. W. N., 36, *Hiralal v. Bhairon*, 5 All., 602, distinguished

SECOND APPEAL from a decree of Babu Gauri Shanker, Subordinate Judge of Farukhabad, reversing a decree of Babu Hira Lal Singh, Munsif.

The facts of the case appear sufficiently from the judgment of the Court.

Surrendra Nath Sen, for the appellant.

Gobind Prasad, for the respondents.

The following judgment was delivered by

Chamier, J.

CHAMIER, J.—This was a suit by one of the widows and the daughter of Qudrat Husain for possession of a *bagh*. The plaintiffs alleged that Qudrat Husain had purchased half the *bagh* by private treaty and the other half at an execution sale, that he had died leaving the plaintiffs as his heirs and that the defendant had interfered with their possession. The lower appellate court has found that Qudrat Husain acquired the *bagh* as stated, that he was in possession of the same within twelve years of the suit, and that he left another widow and a son, whose whereabouts were unknown but whose death had not been proved, but that the plaintiffs as two of the heirs of Qudrat Husain were entitled to a decree for possession of the whole *bagh*.

The first point taken in second appeal is that secondary evidence of the purchase of half the *bagh* was not

* S. A. N. 688 of 1912.

admissible. It appears to me, on the facts found, that the case falls under section 65 (a) or 65 (c) of the Evidence Act and that any secondary evidence of the sale was admissible. The Subordinate Judge finds the sale proved and it is not suggested that there is no evidence to support the finding. Next it is contended that the rights of the original owners of the *bagh* were not transferable. It appears to me that even if they were not transferable, Qudrat Husain having held possession of the *bagh* had an interest which devolved upon his heirs and that his heirs are entitled to recover possession against any one who cannot show a better title than they have. The third and last point taken is that the plaintiffs are not entitled to recover more than their share of the grove, because the existence of another widow and of a son has been proved. The plaintiffs rely on the decision, *Mannu v. Nasrat-ullah* ⁽¹⁾, which follows a previous ruling of this Court, *Hiralal v. Bhairon* ⁽²⁾. It seems to me that the decisions cited do not cover the present case. They amount to no more than this that one of several persons jointly interested in land may sue to eject a trespasser where the removal of the trespasser is necessary to give the plaintiff enjoyment of his rights. In the present case, the plaintiffs have definite shares in the grove of which they can be given possession and, in my opinion, they are not entitled to possession of any larger share. The plaintiffs are between them entitled to a $\frac{17}{18}$ share in the grove. I modify the decree of the lower appellate court by giving the plaintiffs a decree for possession of a $\frac{17}{18}$ share in the grove. The parties will pay and receive proportionate costs throughout.

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Rohan Singh
v.
Ahsan Begam.
Chamier, J.

Decree modified.

(1) [1901] 21 A. W. N., 36.

(2) [1883] I. L. R., 5 All., 602.

CIVIL.

1912.

November, 22.

CHAMIER, J.

SURANJAN SINGH AND ANOTHER

versus

RAM BAHAL LAL AND OTHERS.*

Code of Civil Procedure (Act V of 1908), section 148—Power of the court to extend time fixed by the decree—Appeal.

Payment of money into court within a fixed time in pursuance of a pre-emption decree is not an act prescribed or allowed by the Code of Civil Procedure within the meaning of section 148. A court, therefore, has no power to extend the time fixed by a decree in a suit for pre-emption for payment of the price. The order extending time fixed by the decree for payment of money is an appealable order. *Jug Ram v. Jiva Ram*, 6 A. L. J. R., 647, *Hukum Chand v. Hayat*, [1912] 121 P. W. R., *Narendra Bahadur v. Ajudhia Prasad*, 13 O. C., 28, approved. *Rahmia v. Naipal Rai*, 14 All., 520, followed.

EXECUTION SECOND APPEAL from a decree of Pandit Ram Avatar Pande, District Judge of Azamgarh, reversing a decree of Babu Lakshmi Narain Tandon, first Additional Munsif.

Application for execution of decree.

The court of first instance rejected the application but the lower appellate court reversed the decree.

Decree-holder appealed.

M. L. Agarwala, for the appellants.

Surendra Nath Sen, for the respondents.

The following judgment was delivered by

Chamier, J.

CHAMIER, J.—These appeals arise out of cross suits for pre-emption. In each case, the plaintiffs were given a decree for pre-emption of half of the property and the decree went on to provide that if they did not pay the price within a month, their claim would stand dismissed and, in that event, the plaintiffs in the other case were allowed a further period of fifteen days within which to pay in the price, so that if either set of plaintiffs failed to pay in the price, the other set would be entitled to take the whole of the property on complying with the terms of the decrees. The decrees in

* E. S. A. No. 53 of 1912.

both cases were made on June 17th, 1911, and the period of one month expired on July 17th—no money was paid into court in either case by that date.

On July 19th, Kirat Singh and others, the plaintiffs in one case, petitioned the court to grant an extension of the time limited by the decree, and by an order of July 25th, time was extended to August 4th. Each set of plaintiffs paid into court the price specified in their decree before August 4th. The purchaser objected but his objection was overruled. He, then, appealed to the District Judge in both cases and it was held that the first court had no power to extend the time limited by the decrees. The plaintiffs have appealed to this Court contending that there was no right of appeal to the District Judge against the orders of the first court and that if the appeals were in order, the District Judge should have upheld the orders of the first court on the merits.

The purchaser has applied in each case for revision of the orders of the first court in case it is held that those orders were not appealable.

The plaintiffs rely upon section 148 of the Code of Civil Procedure as authorising the Munsif to extend the time fixed in the decrees.* In *Jug Ram v. Jewa Ram* (1), BANERJI and TUDBALL, JJ., expressed grave doubts whether this section applied to suits for pre-emption, and in *Hukam Chand v. Hayat* (2), REID, C. J., held that this section did not apply to periods fixed by a decree. To the same effect is the decision of Messrs. EVANS and PIGGOTT in *Narendra Bahadur v. Ajudhia Prasad* (3). I agree with the views expressed in these cases. It appears to me that the payment of money into court within a fixed time in pursuance of a decree is not an Act prescribed or allowed by the Code within the meaning of section 148. According to the decision in *Rahima v. Nepal Rai* (4), which is binding upon me, I must hold that the orders of the Munsif were appealable. In my opinion the District Judge was right in setting those orders aside. The two appeals to this Court are dismissed with costs.

Appeals dismissed.

(1) [1909] 6 A. L. J. R., 647.

(2) [1912] 121 P. W. R.

(3) [1909] 13 O. C., 28.

(4) [1892] I. L. R., 14 All., 520.

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Suranjan Singh
v.
Ram Bahal Lal,
Chamier, J.

CIVIL.

1912.

November, 19.

BANERJI, J.

SHYAM CHANDER SINGH

versus

BALDAO AND OTHERS.*

Regulation No XVII of 1806, section 8—Suit for foreclosure—Barred by limitation if no proceedings taken under the Regulation—Limitation period of—12 years—Limitation Act (XV of 1877), article 147—Transfer of Property, no provision for foreclosure before passing of.

A mortgage by conditional sale made in 1865 provided that the mortgage money should be repaid in 1866. In a suit for foreclosure and for possession of the mortgaged property brought in 1910, *held* that no proceedings having been taken under Regulation XVII of 1806 and the mortgagee's right to make an application for foreclosure having become extinct by reason of efflux of time he could not take possession without obtaining foreclosure in accordance with the provisions of the Regulation and the claim was barred by time.

Held, further, that Article 147 to the schedule to Act XV of 1877 did not apply to foreclosure proceedings under Regulation XVII of 1806.

APPEAL against a decree of J. H. Cuming, Esq., District Judge of Jhansi, confirming a decree of Mr. Kauleshur Nath Rai, Munsif of Orai.

Musammat Ram Bai and Shambhu and Sumer executed a mortgage by way of conditional sale in favour of one Tika Ram for Rs. 99-13-0. The bond was dated the 6th of May, 1865. The money was to be repaid on the 3rd of March, 1866. In case of default the sale was to become absolute.

The plaintiff-appellant represented the mortgagee Tika Ram. Defendants 1 to 3 represented the original mortgagors and the defendants 4 to 6 were in possession of the property under a subsequent foreclosure decree.

Plaintiff brought the suit for foreclosure. The first court dismissed the claim holding it barred under Article 135 of Act XV of 1877. The District Judge confirmed the decree.

The plaintiff appealed.

Shamnath Mushran (*Tej Bahadur Sapru* with him), for the appellant.

* S. A. 547 of 1912.

The case in

Srinath Das v. Khetter Mohan Singh, [1889] I. L. R., 16 Cal., 693, P. C.,

relied on by the courts below did not apply. In that case the bond provided on the face of it that the mortgagee was to take possession on the date of default. It was different here.

Regulation XVII of 1806 gave one year to mortgagor from issue of notice on him and till then his rights did not determine. Twelve years were to be counted from the determination of his rights. The mortgagee had no right to possession till he had taken proceedings under section 8 of the Regulation.

Hub Ali v. Wazir-un-nisa, [1906] 28 All., 496, at 508.

He could be ejected if he entered. The distinction between the two kinds of cases was pointed out in

Modun Mohan Chowdhry v. Ashad Ally Beparee, [1884] 10 Cal., 68.

Parties could contract themselves out of the benefits conferred by the Regulation. When the deed did not give a right of entry on default, limitation did not run from that date.

Same observations in

Brojonath Koonadoo Chowdhry v. Khelut Chunder Ghose, [1871] 14 Moores I. Ap., 144.

Satish Chander Banerji, for respondents.

The petition for foreclosure was to be made within 12 years.

Murlidhar v. Kanchan Singh, [1889] 11 All., 144.

All that the Privy Council decide in 20 All., is that foreclosure proceedings had to be taken before mortgagee could enter. They do not decide within what time they were to be taken. Privy Council had held in

Vasudeva Mudaliar v. Srinivasa Pillai, [1907] 30 Mad., 426. that only 12 years' limitation applied to foreclosure claims except in case of English mortgages. Here the claim was barred before it could be saved by section 31 of the Limitation Act.

The mortgagee could claim no grace unless his rights subsisted like the introduction of the Transfer of Property

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Act in 1882. Suits for foreclosure were not known before in the Mufassil.

Sharnomoyee Dasi v. Srinath Das, [1885] 12 Cal, 614.

The Article governing would be either 135 or 144. Article 147 would apply to cases after passing of the Transfer of Property Act.

Shib Lal v. Ganga Prasad, [1884] 6 All., 551.

Ram Dawar Rai v. Bhirgu Rai, [1912] 15 Ind. Cases, 240.

Shamnath Mushran, in reply.

The judgment of the Court was delivered by

Banerji, J.

BANERJI, J.—This was a suit for foreclosure of a mortgage by way of conditional sale, dated May 6th, 1865. The amount secured by the mortgage was Rs. 99-13-0. The document provided that the said amount should be repaid with interest on *Chait Sudi 15th* of the following year, corresponding to March 31st of 1866. The defendants 1 to 3 are heirs of the mortgagor. The defendants 4 and 5 are in possession of the mortgaged property under a foreclosure decree obtained subsequently to the date of the plaintiff's mortgage. The present suit was brought on August 4, 1910, and by it the plaintiff claimed foreclosure of the mortgage and possession of the property comprised in it. The court of first instance dismissed the suit on the ground that it was time-barred and this decree has been affirmed by the lower appellate court. The courts below were of opinion that as the plaintiff mortgagee did not take possession within 12 years of March 31st, 1866, the claim was barred by limitation. This appeal has been preferred by the plaintiff, and it is contended, that as the plaintiff could not take possession without obtaining foreclosure proceedings, the fact of his not having taken possession within 12 years did not deprive him of his right to foreclose the mortgage and to sue for possession. This being a mortgage to which Regulation XVII of 1806 applied, the procedure for foreclosing it was that prescribed by section 8 of the Regulation. Until the mortgage was foreclosed in accordance with the Regulation, the mortgagee's right to possession did not accrue. This was held by their Lordships of the Privy Council in *Hub Ali v. Wasir-un-nissa* (1). In that case their Lordships observed that "there was

(1) [1906] I. L. R., 28 All., 496. °

no right to take possession of the property without the procedure prescribed by law." So that, unless foreclosure proceedings were taken under the Regulation the mortgagee had no right to take possession. If the mortgage-deed had provided for possession the mortgagee would have been bound to sue for possession within twelve years, and if he did not do so, his right as mortgagee would become extinct and the result would have been that he could not subsequently bring a suit for foreclosure. This was the case in *Sri Nath Das v. Khetter Mohan Singh* ⁽¹⁾. The distinction between a case in which the mortgage-deed provided for possession and a case in which the mortgagee could only take possession after getting the mortgage foreclosed by taking foreclosure proceedings under Regulation XVII of 1806 was pointed out in *Madan Mohan Choudri v. Ashad Ali Beparee* ⁽²⁾. It seems to me, therefore, that the ground on which the courts below dismissed the suit cannot be supported. The learned advocate for the respondents, however, contends, that as before the passing of the Transfer of Property Act no suit for foreclosure could be brought and the only remedy of a mortgagee under a mortgage by way of conditional sale, was to take foreclosure proceedings under Regulation XVII of 1806, the plaintiff could not maintain his suit unless he had taken those proceedings within the period of limitation applicable thereto; that the period of limitation for such proceedings was 12 years, and as no proceeding was taken within 12 years of March 31st, 1866, the right to foreclose had become extinct before the Transfer of Property Act came into operation, and the passing of that Act could not revive it. This contention seems to me to be well founded. It has been held by the Calcutta High Court and by this Court that the limitation for an application for foreclosure under Regulation XVII of 1806 was 12 years. I need only refer to the case of *Karimdad Khan v. Mustaqim Khan* ⁽³⁾ in which other cases on the point are cited. Therefore the plaintiff's right to apply for foreclosure proceedings became extinct on March 31st, 1878. On that date no suit for foreclosure could be brought in respect of a mortgage like the one

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Shyam
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Banerji, J.

(1) [1889] I. L. R., 16 Cal., 693. (2) [1884] I. L. R., 10 Cal., 68.

(3) [1903] I. L. R., 26 All., 4.

PHUL SINGH AND OTHERS

versus

KING-EMPEROR.*

*Penal Code, section 379—Crop cut by landlord jointly with tenant—
Theft—Not a case of.*

CRIMINAL

1912.

November, 22.

TUDBALL, J. •

Where it appeared that a landlord had jointly cultivated land with a non-occupancy tenant and had cut and removed the crops, *held* that the landlord must be deemed to be part owner and in possession and could not be convicted of theft.

CRIMINAL REFERENCE made by R. C. Tute, Esq., Additional Sessions Judge of Meerut.

The material facts appear from the following order of reference :—

This is a case in which Phul Singh and his co-accused have been convicted of stealing some 30 cart loads of crop grown in Rabi 1319.

Para. 4 of the application for revision (the sentences being unappealable) gives the strongest reason for supposing the case to be one of a purely civil nature and for holding that there was no dishonest intention and therefore no theft took place.

It is shown that during the season under dispute and indeed during the previous *kharif* the share of complainant in the *khata* in dispute was only a half.

The canal papers show that certain plots of it are cultivated by Phul Singh and the complainant's family jointly or by Phul Singh alone. All this shows beyond question that the case is one not of theft but of a civil right. The lower court had no legal justification for treating the action of the accused as a crime.

I can find no justification for its action on the record except the fact that the *khasra* maintains the old entry showing complainant as full owner of the crops. This is largely discounted by the *khatauni*, and when the latter is taken in connection with the canal records, the *khasra* entry

*Cr. Ref. No. 861 of 1912.

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Phul Singh
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is proved to be incorrect. The case is one which should, in my opinion, be submitted to the Hon'ble High Court for revision. I direct that the record be forwarded for this purpose together with the explanation, if any, of the court concerned.

Neither party was represented.

The following judgment was delivered by

♦
Tudball, J.

TUDBALL, J.—The record of this case has been submitted to this Court by the Sessions Judge, with a recommendation that the convictions and sentences on the accused be set aside. The matter is a dispute between a landlord and a non-occupancy tenant. The tenant's case was that the landlord cut and removed his crops. The landlord's defence was that he removed the crops because he had jointly cultivated the land and was a part owner thereof. There can be very little doubt, as the Sessions Judge has pointed out, that the accused Phul Singh did share in the cultivation and therefore he must be deemed to have been in possession of the property alleged to have been stolen. The case is clearly not one in which the accused could possibly have been convicted of theft. I, therefore, accept the recommendation of the Sessions Judge and set aside the convictions and sentence. The fines if paid, will be refunded. The order for payment of compensation to the complainant is set aside.

Conviction set aside.

MITHAN LAL

versus

MIZAJI LAL AND OTHERS *

Agra Tenancy Act (II of 1901, U P.), section 164—Suit against lambardar by co-sharers—Burden of proof shifts when negligence proved—N.-W. P. Rent Act (XII of 1881), section 209

CIVIL,

1912.

November 22.

CHAMIER, J.

Where in a suit for his share of his profits by a co-sharer against the *lambardar* under section 164 of the Tenancy Act it is proved that a very large percentage of the rent remained uncollected and the *lambardar* admitted that he had kept no accounts and had not had all collections entered in *patwaris' sinha*, held that under the circumstances it was for the *lambardar* to explain why so large a sum remained uncollected and that the plaintiffs had been rightly given a decree for profits calculated on the demand.

Held, further, that there is no difference in the meaning of section 164 of the Agra Tenancy Act and section 209 of the Rent Act (XII of 1881)

SECOND APPEAL from a decree of E. C. Allen, Esq., District Judge of Mainpuri, modifying a decree of Pandit Raghunath Prasad, Assistant Collector, first class.

The facts of the case appear from the judgment of the Court.

G. L. Agarwala and Gulzari Lal, for the appellant.

Baldev Ram Dave, for the respondent.

The following judgment was delivered by

CHAMIER, J. :—This is a suit by a co-sharer in a village against the *lambardar* for the profits of the plaintiff's share for *rabi*, 1315 Fasli and for the years 1316 and 1317 Faslis. The only question for decision is whether the lower appellate court was right in giving a decree to the plaintiffs for the profits calculated on the demand and not on the actual collections. The lower appellate court was of opinion that the plaintiffs had succeeded in showing that the *lambardar's* failure to collect a larger sum during the years in question was due to negligence. In second appeal it is contended that, whatever may have been the law previously, according to the present law which is contained in section 164 of the Tenancy Act, the plaintiff must in a case of this kind prove precisely what sums have remained uncollected owing to the negligence

Chamier, J.

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Mizaji Lal.

Chamier, J.

of the *lambardar*, that is to say, he must in the case of each tenant show that the sum not collected from him remained uncollected owing to the negligence of the defendant. The language of the section no doubt differs to some extent from the language of section 209 of the old Rent Act (Act XII of 1881), which it has replaced, but it appears to me that the meaning of the two sections is practically the same. The Tenancy Act has been in force for nearly eleven years and the learned vakils for the defendant in the present case are unable to refer me to any case in which it has been held that the plaintiff, who claims more than his share according to the collections, must go into the account of each tenant and show what items have remained uncollected owing to the negligence of the *lambardar*. As far as I know, the practice has been the same under the Tenancy Act as it was under the old Rent Act of 1881. The burden of proof is placed in the first instance on the plaintiff, who is required to produce some general evidence of negligence on the part of the *lambardar*, such as, evidence that a very large percentage of the rent has remained uncollected. The court then calls upon the *lambardar* to explain why so large a percentage has remained uncollected, and in the absence of a satisfactory explanation shifts the burden of proving the real profits of the property on to him. This is what has been done in the present case, but in addition to producing evidence that a very large percentage of the rent remained uncollected the plaintiffs proved several other suspicious circumstances. They also obtained from the *lambardar* an admission that he had kept no accounts and that he had not had all the collections entered in the patwari's *siaka*. In these circumstances I must hold that the plaintiffs gave more than *prima facie* proof of the negligence of the *lambardar*, and that the burden was rightly shifted on to the *lambardar* to explain why so large a sum remained uncollected. In my opinion the court was right in giving the plaintiffs profits calculated on the demand. But it omitted to allow the *lambardar* his *lambardari* dues on the plaintiff's share of the collections. The sum is Rs. 10-10-0. To this extent the appeal is allowed with proportionate costs throughout.

Appeal allowed in part.

ANGAN AND OTHERS

versus

RAM PIRBHAN.*

CRIMINAL.

1912.

November, 23.

TUDBALL, J.

Criminal Procedure Code (Act V of 1898), section 203, section 437—Complaint summarily rejected—Further enquiry could be ordered without notice to accused.

“A notice to a person against whom a complaint is made is quite unnecessary where it is sought to set aside the summary order in a proceeding to which he was actually no party”

CRIMINAL REVISION against the order of E. M. Nanamutty, Esq., District Magistrate of Badaun, reversing the order of dismissal, under section 203, Criminal Procedure Code, of a complaint and ordering further inquiry to be made.

The facts fully appear from the judgment.

The question for decision was whether an order directing the court below to make further enquiry could be passed without notice to the person against whom the order was made.

R. K. Sorabji, for the applicants :—It is a well-established principle of criminal law that no order should be passed to the prejudice of any party by a court exercising appellate or revisional powers without giving that party an opportunity of showing cause against the passing of such order. Although section 437 of the Criminal Procedure Code does not expressly provide for the giving of such an opportunity, yet precedents have laid down the rule that it should be given. I rely on the case of

Queen-Empress v Ajudhia and another, [1898] I. L. R., 20 All., 339, and on the cases cited therein.

[TUDBALL, J.—But those are cases where the accused person was discharged and not cases where the complaint was dismissed forthwith under section 203, without making the accused person a party.]

* Cr. Rev. No. 822 of 1912.

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As regards the advisability or desirability of giving notice to the party affected there is no difference in principle between the two cases.

[TUDBALL, J.—In a case like the present it cannot be said that the order was made behind the applicants' back; for they were not parties at all, and were not entitled to any notice. The case would have been different if they had been tried and discharged.]

It would, at all events, have been fairer and more expedient to have given them a chance of showing the court that there was no ground for ordering a further enquiry.

[TUDBALL, J., referred to

I. L. R., 29 Cal., 726 and I. L. R., 9 All., 85.]

G. W. Dillon, for the opposite party, was not called upon.

The following judgment of the Court was delivered by

Tudball, J.

TUDBALL, J.—One Ram Pirbhan *alias* Ram Parpan, filed a complaint in the court of a first class Magistrate against the present applicants, preferring a charge of defamation against them. The petitioner's complaint was dated the 21st August, 1912, but was filed in court on the 22nd August. The Magistrate recorded the complainant's statement on oath and forthwith dismissed the complaint. The complainant at once went to the District Magistrate in revision and the latter ordered a further enquiry. The applicants come to this Court in revision against that order and the main contention is that the order was passed behind their back and without notice to them and is therefore bad in law. In my opinion there is no substance in the contention for the simple reason that there has been no order of discharge whatsoever. They at no time had been called upon to appear and defend. The Magistrate has simply dismissed the complaint without any enquiry whatsoever. Under rulings of this Court it would have been open to the same Magistrate to accept a fresh complaint by the complainant on the same facts and to have taken action thereon and to have made an enquiry. To the same effect is the decision of a Full Bench of the Calcutta High Court (1). In my opinion a notice to a person

(1) (*Vide* I. L. R., 9 All., p. 85 and I. L. R., 29 Cal., p. 726).

against whom a complaint is made is quite unnecessary, where it is sought to set aside the summary order in a proceeding to which he was actually no party. In the present instance the complaint was dismissed without enquiry and at the very least the complainant was entitled to an enquiry even though only under section 202, Criminal Procedure Code. It was open to the court to make an enquiry under section 202 of the Code or after issue of summons to the accused person. My attention has been called to certain rulings of this Court, *e. g.*, (1), but an examination of these rulings shows that they were all cases in which the accused was tried and discharged and a further enquiry was ordered behind his back and without notice issued to him. In my opinion this was not a case in which it was necessary to issue notice to the accused persons before ordering further enquiry. I therefore reject the application. The proceedings which have been stayed will be continued.

B. K. M.

Application rejected.

(1) I. L. R., 29 All, p 339.

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 Ram Pirbhan
 Tudball, J.

BANWARI LAL AND OTHERS

versus

MUSAMMAT RAMA AND OTHERS.*

Code of Civil Procedure (Act V of 1908), section 2—Mesne profits, definition of—Interest included whether mentioned or not.

CIVIL.
 1912.
 November, 28.
 GRIFFIN, J.

Where a decree awards mesne profits but is silent as to interest on the mesne profits so awarded, *held* that mesne profits included interest on such profits

EXECUTION FIRST APPEAL from the decree of Babu Banke Behari Lal, Subordinate Judge of Mainpuri.

The facts, so far as they are material to this report, appear sufficiently from the judgment.

Govind Prasad, for the appellants :—"Mesne profits" by definition includes interest on those profits. The separate

* E. F. A. No. 263 of 1912.

CIVIL.

1912.

Banwari Lal
v.
Rama.

prayer for interest on mesne profits was, therefore, a mere surplusage. The decree granted mesne profits. By so doing it necessarily granted also the interest thereon; there was no necessity for awarding the interest separately. No issue was framed as to whether the interest should or should not be awarded, and there is nothing in the judgment to show that interest was refused. The mere omission in the decree of the word interest cannot, in this case, lead to the inference that interest was refused by implication. At all events, the decree has awarded "mesne profits," which, by definition, carries interest along with it. I rely on the ruling in

Grish Chunder Lahiri v Shoshi Shikhareswar Roy, [1900 I L R., 27 Cal., 951; at p 967, P C.

The respondents were not represented.

The following judgment was delivered by

Griffin, J.

GRIFFIN, J.—This appeal arises out of an application for execution of a decree for mesne profits. The decree-holders claimed interest on mesne profits. The court below held that the decree-holders were not entitled to interest inasmuch as the original decree was silent as to interest on mesne profits. In the plaint interest had been asked for on mesne profits. The learned Subordinate Judge was of opinion that as the decree was silent on the question of interest, the relief as to interest should be deemed to have been refused. The decree-holders appeal.

It appears from the definition of the term 'mesne profits' that it includes interest on such profits. The original decree must, therefore, have included interest on mesne profits and the decree-holders were entitled in execution of their decree to interest thereon. I allow the appeal, set aside the order of the court below in so far as it dismisses the decree-holders' claim for interest on mesne profits and direct that the application be dealt with by that court according to law. The respondents are not represented here. The appellants will get their costs in this appeal.

B. K. M.

Appeal allowed.

RAM LAL
versus
 AMAR CHAND.*

Indian Limitation Act, article 152—Appeal to District Judge against revenue court decree—Limitation—Procedure as prescribed by the Civil Procedure Code.

CIVIL.
 —
 1912.

November, 28.

GRIFFIN, J.

An appeal against a decree of the revenue court was filed before the District Judge beyond 30 days from the date of the decree, *held* that the appeal to the judge was governed by the procedure prescribed by the Code of Civil Procedure and an appeal to the judge must be filed within a period of 30 days prescribed under article 152 of the Indian Limitation Act.

APPLICATION for civil revision of an order of J. H. Cuming, Esq., District Judge of Jhansi, rejecting as time-barred an appeal under the Tenancy Act from a decision of a revenue court.

The facts, so far as they are material to this report, appear fully from the judgment.

A. H. C. Hamilton, for the applicant:—The lower appellate court was wrong in assuming that the limitation for the appeal before it was 30 days. The Legislature has prescribed no period of limitation for appeals to civil courts under the Tenancy Act from decisions of the revenue courts. The fourth schedule of the Tenancy Act prescribes periods of limitation for appeals to a Collector, a Commissioner, and to the Board, but none for appeals to a district judge. The Tenancy Act is a complete Code in itself so far, at least, as limitation is concerned, *vide* sections 168 and 169, and the fourth schedule. We cannot, therefore, go beyond the Tenancy Act to look for limitations of appeals created by section 177 or any other provision of that Act. I rely upon the principles laid down in the case of

Dropadi v. Hira Lal, [1912] 1 A. L. J. R., 3. F. B.

The Limitation Act cannot, therefore, be called in aid. Section 29, clause (b) of that Act would be a further bar. Besides, article 152 of the Limitation Act provides only for appeals

* Civ. Rev. No. 101 of 1912.

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v.
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under the Code of Civil Procedure, and not for appeals under the Tenancy Act.

Binoy Koomar Mukerjee, for the opposite party :—Section 193 of the Tenancy Act provides that the procedure of all suits or other proceedings under the Tenancy Act shall, with certain exceptions, which do not call for consideration in this case, be that laid down by the Code of Civil Procedure; unless where it is otherwise provided for by the Act itself. The entire procedure of appeals created by the Tenancy Act is, therefore, governed by the Code of Civil Procedure, except in so far as the Act may have otherwise provided. Section 177 of the Tenancy Act creates an appeal to a district judge; having created the appeal the Act leaves the subsequent procedure thereof to be guided by the Code. Limitation is a matter relating to procedure.

Her Highness Ruckmaboye v Lalloobhoy Mottichand, [1852] 5 M I A., 234; at p 265 *et seq.*

Therefore, the limitation of appeals under the Tenancy Act would, unless otherwise provided by the Act itself, be governed by the Code; that is, would be the same as for appeals under that Code. Thus article 152 would govern appeals to district judges under the Tenancy Act; it was unnecessary for the Tenancy Act to prescribe the limitations for appeals to civil courts, as they are already prescribed by articles 152 and 156. I am supported by the observations at p. 12 of 10 A. L. J. R., cited above. There being no period of limitation prescribed by the Tenancy Act itself for appeals to civil courts, section 29, clause (b) of the Limitation Act, has no application. The contention on behalf of the applicant is against the long-established practice of the courts, and would result in there being no limitation whatsoever for appeals to civil courts under the Tenancy Act which certainly could not have been contemplated by the legislature.

A. H. C. Hamilton, in reply :—No express provision prescribing the limitation in this case has been shown. Statutes of limitation, being in their nature derogatory to substantive rights of suit or appeal, should be strictly construed, irrespective of any considerations of a possibly incongruous result.

The following judgment was delivered by

GRIFFIN, J.—A second appeal, in a revenue suit, to the learned District Judge of Jaunpur, was dismissed by him on a preliminary ground that the appeal had been filed beyond time and no sufficient cause had been shown for extending the time for the filing of the appeal. Two grounds have been taken in the application for revision to this Court. One ground is that on the merits the applicant was entitled to the benefit of section 5 of the Limitation Act. From the facts set out in the judgment of the court I am satisfied that the decision of the court below on that point was correct. The applicant had himself to thank for the delay in the filing of the appeal after the expiry of one month from the date of the decree. The second ground raises a question as to which no ruling has been quoted before me. Mr. Hamilton for the applicant contends that the Tenancy Act does not prescribe any period of limitation for appeals preferred to district judges under the provisions of section 167 of that Act. He points out that schedule E of that Act prescribes periods of limitation for appeals to Collectors, Commissioners and the Board, whereas in the matter of appeals to district judges the Act is silent. He refers to section 29(b) of the Limitation Act which provides that nothing shall affect or alter any period of limitation prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India. As a matter of recognised practice, limitation for appeals to district judges has always been taken to be one month from the date of the decree, and it appears to me that the provision of section 193 of the Tenancy Act sufficiently covers the question now before me. That section provides that the provisions of the Code of Civil Procedure shall apply to procedure in all suits and other proceedings under the Tenancy Act so far as they are not inconsistent therewith, subject to certain modifications. An appeal to the district judge is, therefore, governed by the procedure prescribed by the Code of Civil Procedure. Under article 152 of the Limitation Act a period of thirty days is prescribed for appeals to district judges. I see no reason to interfere. The application is dismissed with costs.

B. K. M.

Application dismissed.

CIVIL.

1912.

Ram Lal
v.
Amar Chand.
Chamier, J.

RAM DAWAR RAI AND OTHERS

versus

BHIRGU RAI AND OTHERS.*

CIVIL

1912.

May, 23.

KARAMAT
HUSAIN, J.
TUDBALL, J.

Regulation XVII of 1806, section 8—Limitation Act, 1908—Section 31, article 135—Suit for foreclosure—No application made under the Regulation—Barred by Limitation on expiry of 12 years from the due date—Limitation Acts of 1859 and 1871—No limitation for foreclosure—Limitation Act (XV of 1877), section 28, article 135.

A mortgage by conditional sale executed in 1830 provided that the mortgagee was entitled to possession at the end of 1257 Fasli (18th September, 1850) on default of payment of the mortgage debt on the due date. No application for foreclosure was made under Regulation XVII of 1806, but a suit for foreclosure was instituted on the 11th July, 1910, *held* that the cause of action arose on the failure to pay the mortgage money on the due date (18th September, 1850), that the mortgagee's right to possession of the property mortgaged was extinguished under section 1, clause (12) of Act XIV of 1859 as soon as twelve years had elapsed from the due date, that the subsequent creation of foreclosure suits could not revive the extinct rights and that the suit was barred by article 135 of the Indian Limitation Act, 1908. *Srinath Das v. Khetter Mohan Singh*, 16 Cal., 693, followed

SECOND APPEAL from a decree of the District Judge of Ghazipur.

The courts below dismissed the suit.

Plaintiffs appealed.

Pearelal Banerji (for *S. C. Banerji*), for the appellants.

Ahmad Kareem (for *Surendro Nath Sen*), for the respondents.

The judgment of the Court was delivered by

Karamat
Husain, J.

KARAMAT HUSAIN, J.—On Sawan Sudi Ashtimi 1237 (28th July, 1830), a mortgage by conditional sale was executed by Pabadu Rai and Chittra Bal Rai, predecessors-in-title of the defendants Nos. 1, 2 and 3, in favour of Bachan Rai, predecessor-in-title of the plaintiffs, to secure a sum of Rs. 800. The deed contains a provision to the effect that the mortgagee shall be entitled to possession at the end of 1257 (18th September, 1850), on default of payment of the mortgage-debt on the due date. I may note here that due date in the judgment of the first court is stated as the 4th of October, 1850, and in that of the lower appellate court as the 4th of April, 1850.

No application for foreclosure was ever made under regulation XVII of 1806, but on 11th of July, 1910, a suit for fore-

*S. A. No. 505 of 1911.

closure was instituted. Limitation was pleaded in defence. The courts below accepted it and dismissed the suit.

The contention in second appeal is that the suit is not time-barred. The substance of the argument of the learned vakil for the appellants is as follows :—

The mortgage by conditional sale in suit was executed when Regulation XVII of 1806 was in force. Section 8 of that regulation allowed a mortgagee to apply for foreclosure on the expiration of the stipulated period or at any time subsequent before the sum lent is repaid and fixed no time within which to apply. With regard to the language of the section, a Full Bench of this Court in *Buldeen v. Golab Koonwer* ⁽¹⁾ held that there was no limitation for an application to foreclose under Regulation XVII of 1806. The Limitation Acts of 1859 and 1871 contain no express provisions for foreclosure suits, nor was there anything in section 28 of Act XV of 1877, to extinguish the mortgagee's right to take foreclosure proceedings. Such being the case, the right to foreclose was in existence when Act XV of 1877 came into force and article 147 of that Act gave to the mortgagee the right to sue for foreclosure 60 years from the date when the money secured by the conditional sale became due, *i. e.*, the 18th of September, 1850. The suit, therefore, which was brought on the 11th of July, 1910, was, according to the provisions of section 31 of the present Limitation Act (IX of 1908) not barred by limitation.

Article 135 of Act XV of 1877 has no application to a foreclosure suit. In terms it applies to a suit for possession as a mortgagee and there is a radical distinction between possession as a mortgagee and possession as an owner.

The Calcutta High Court cases, *Denonath Gangooly v. Nursing Proshad Dass* ⁽²⁾, *Ram Chunder Ghosaul v. Juggutman Mohiney Dobee* ⁽³⁾, *Madun Mohan Chowdhory v. Ashadally Beparee* ⁽⁴⁾, and *Shuronomoyee Dasi v. Srinath Das* ⁽⁵⁾, proceed on the assumption that when a mortgage by conditional sale

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(1) [1867] N.-W. P. H. C. (F. B.), 102.

(2) [1877] 14 B. L. R., 87 ; 22 W. R., 90.

(3) [1878] I. L. R., 4 Cal., 283 ; 3 C. L. R., 336.

(4) [1883] I. L. R., 10 Cal., 68 ; 13 C. L. R., 51.

(5) [1885] I. L. R., 12 Cal., 614.

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*Karamat
Husain, J.*

contains stipulation that on failure to pay on the due date the mortgagee is entitled to possession as an absolute owner and discard the provisions of section 8 of Regulation XVII of 1806. Strictly speaking, they have no bearing on the limitation applicable to a foreclosure suit. The Privy Council case in *Srinath Das v. Khetter Mohan Singh* ⁽¹⁾ is based on the notion of an English mortgage in which the mortgagee became the absolute owner of the property mortgaged with a liability to re-convey on the happening of certain events.

The cases in *Murlidhar v. Kanchan Singh* ⁽²⁾ and *Karim Dad Khan v. Mustaqim Khan* ⁽³⁾, are in conflict with the Full Bench case in *Buldeen v. Golab Konwar* ⁽⁴⁾. That Full Bench case had not been overruled. The learned vakil for the respondent urges that the rulings of the Calcutta and the Allahabad High Courts, which have been referred to by the learned vakil for the appellants, expressly lay down that twelve years' limitation applies to the present case, that the Privy Council case in *Srinath Das v. Khetter Mohan Singh* ⁽⁵⁾ is conclusive on the point and that the cases in *Janki v. Musammat Jai Dei* ⁽⁶⁾ and *Mamau v. Ishri Prasad* ⁽⁷⁾ are to the same effect.

Apart from the case law on the subject there is much force in the contention of the learned vakil for the appellants that there is no limitation for an application to foreclose under Regulation XVII of 1806 and that the present suit is not barred by time, but the rulings of this Court, the Calcutta High Court, of Oudh, of the Punjab and of the Privy Council are against him.

So far back as in *Denonath Gangooly v. Narsingh Prashad Dass* ⁽⁸⁾, in a suit upon mortgage by conditional sale providing that the mortgage debt should be paid on the 9th of July, 1855, and that on default of payment the deed of conditional sale should become one of absolute sale and that

(1) [1888] I. L. R., 16 Cal., 693, at p. 700; 16 I. A., 85.

(2) [1888] I. L. R., 11 All., 144

(3) [1903] I. L. R., 26 All., 4

(4) [1867] N.-W. P. H. C. (F B), 102.

(5) [1888] I. L. R., 16 Cal., 693, at p. 700; 16 I. A., 85.

(6) 9 O. C., 147.

(7) [1899] 35 P. R.

(8) [1877] 14 B. L. R., 87; 22 W. R., 90.

the mortgagee should thereupon acquire the absolute proprietary right, it was held that the cause of action arose on the 9th of July, 1855, when default was made in payment of the mortgage-debt and the suit not having been instituted within twelve years from that date, was barred by section 1, clause 12, Act XIV of 1859, and that no new cause of action arose by reason of the foreclosure proceeding on the expiry of the year of grace in August, 1868.

Since the decision in the above case the trend of authority in the Calcutta High Court has been in the same direction regarding suits on mortgage by conditional sale which contain a stipulation to the effect that on failure to pay on the due date the mortgagee will be entitled to possession. In *Ram Chunder Ghosaul v. Juggut Monmohiney Dabee*⁽¹⁾, it was held that the suit by a mortgagee under a conditional sale was barred by Act XIV of 1859, as being brought more than 12 years after the cause of action arose and that that Act not only barred the remedy but extinguished the right, and that, therefore, the plaintiff could derive no advantage from the extended period of limitation given by article 149 of Act IX of 1871, which repealed the Act of 1859.

Modun Mohun Chowdhry v. Ashadally Beparee ⁽²⁾ expressly draws a distinction between the conditional sales in which there is a stipulation that the mortgagee on default of payment of the mortgage-debt is to take possession of the property and those in which there is no such stipulation and lays down that in the former case he has twelve years from the date of default, and that in the latter the right of the mortgagee to take possession does not accrue until after the expiration of the year of grace.

Shurnomoyee Dasi v. Srinath Dass ⁽³⁾ rules that a mortgage in the English form between Hindus in the mofussil outside Calcutta has always been treated by the courts as a mortgage by conditional sale, and that under Act XIV of 1859 a mortgagee was ordinarily bound to bring his suit within twelve years from the date of default and was barred thereafter. This is an important case. It went up in appeal to

(1) [1878] I. L. R., 4 Cal., 283 ; 3 C. L. R., 336.

(2) [1883] I. L. R., 10 Cal., 68 ; 13 C. L. R., 51.

(3) [1885] I. L. R., 12 Cal., 614.

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the Privy Council and the decision of the High Court was upheld. See *Srinath Das v. Khetter Mohun Singh* (1). In *Girwar Singh v. Thakur Narain Singh* (2) the following important passage occurs:—"Under the Acts of 1859 and 1871, the law of limitation governing suits by mortgagees under *kutkobala* or bill of conditional sale was as follows:—Where a *kutkobala* gave to the mortgagee the right to recover possession on default of payment, the period of limitation for a suit based upon this stipulation was 12 years", see *Brojonath Koondoo Chowdry v. Khehul Chunder Ghose* (3) Article 135 of the Act of 1871. In courts not established by Royal Charter in the presidency of Bengal, the period of limitation for a suit for possession of the mortgaged property, upon the conditional sale becoming absolute under the provisions of Regulation XVII of 1806, was 12 years from the date when the sale became absolute. *Ghinarain Dobe v. Ram Monaruth Dubey* (4). *Modun Mohun Chowdhry v. Ashadally Beparee* (5). But in the cases where the right of the mortgagee has been extinguished by the law of limitation, the proceedings under Regulation XVII of 1806 did not give a fresh start. See *Modun Mohun Chowdhry v. Ashadally Beparee* (6). Now, in the year 1877, when the present Act was passed, foreclosure suits were not known in the courts not established by Royal Charter in the Bengal presidency. In the year 1877, therefore, suits under *kutkobalas* or conditional bills of sale for possession of the mortgaged property were not covered by article 147. The period of limitation for such suits, which was 12 years under the Act of 1871, was consequently not altered by the new Act. *Srinath Das v. Khetter Mohun Singh* (7) is the most important case on the point. Their Lordships of the Privy Council in it remark:—"From this decree, sixteen of the defendants appealed to the High Court. The court was of opinion that the mortgagor's right to posses-

(1) [1888] I. L. R., 16 Cal., 693, at p. 700; 16 I. A., 85.

(2) [1886] I. L. R., 14 Cal., 730, at p. 756.

(3) [1871] I. L. R., 14 M. I. A., 144; 8 B. L. R. 104; 16 W. R. (P. C.), 33.

(4) [1880] 7 C. L. R., 580; I. L. R., 6 Cal., 566, note.

(5) [1883] I. L. R., 10 Cal., 68; 13 C. L. R., 51.

(6) [1883] I. L. R., 10 Cal., 68; 13 C. L. R., 51.

(7) [1888] I. L. R., 16 Cal., 693, at p. 700; 16 I. A., 85.

sion determined on the 17th of February, 1866; that the mortgagee's right to bring a suit for possession was barred on the 17th of February, 1878; that, with the right to possession, was lost the right to take foreclosure proceedings under the regulation of 1806; and that suits for foreclosure were then unknown in the Bengal mofussil. They therefore concluded that the suit was barred by force of article 135, and they dismissed it against all the defendants except Huri Narain. No one has appeared, and their Lordships have not had the advantage of hearing argument in support of the decree; but after taking time to consider, their Lordships find themselves in agreement with the High Court.....If article 135 is the one applicable to the case, the 12 years there allowed ran out in the month of August, 1878 at the latest.

In order to succeed then the plaintiff must show that article 135 is wholly inapplicable to this case. To do that, it is contended that article 135 applies only to those cases in which a mortgagee desires to take possession in that character; that if he wishes to foreclose he may do so within the time limited by article 147; that on the 1st July, 1882, the right to maintain foreclosure suits was conferred on Bengal mortgagees; and that the Limitation Act immediately fastened on those suits and provided 60 years as the limit for them.

To this argument it is sufficient for the present case to answer that in the year 1878, when no suit for foreclosure could be brought, the right of Shama Sundari to possession was wholly extinguished, and the title of the purchasers under Huri Narain freed from the mortgage. The subsequent creation of suits for foreclosure could not, except by clear enactment, revive the extinct right, and in effect the clear enactment is the other way, for section 2, clause (c) of the Transfer of Property Act says that nothing therein shall affect any right or liability arising out of a legal relation, constituted before this Act comes into force, or any relief in respect of such right or liability. Their Lordships consider that within the meaning of this section the right of the purchasers to unencumbered ownership of their plots have arisen out of the legal relations between them and Huri Narain and Shama Sundari,

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It is, therefore, unnecessary to discuss what has been so much urged at the bar, *viz.*, the effect to be attributed to article 147, a provision which appeared for the first time in the Act of 1877".

The ruling not only lays down that article 135 applies to the present case, but answers almost all the points urged by the learned vakil for the appellants. *Janki v. Musammat Jai Dei* ⁽¹⁾ was a suit on a mortgage by conditional sale, dated the 3rd May, 1863, in which the stipulation was that in default of payment on the due date the mortgagee would be entitled to possession. Article 135 of the Limitation Act of 1877 was applied. WELLS, A. J. C., had considerable doubts about the case, but the rulings of the Calcutta High Court and especially the ruling of the Privy Council in *Srinath Das v. Khetter Mohun Singh* ⁽²⁾ made him hold that the suit was barred by limitation. Regulation XVII of 1806 is still in force in the Punjab and in a suit on a conditional sale [*Moman v. Ishri Prashad* ⁽³⁾], in which foreclosure proceedings were instituted more than 12 years after the determination of the mortgagor's right to possession, it was held that the suit, not having been brought within 12 years of the date fixed in the mortgage for the payment of the mortgage money was barred by limitation either under article 135 or article 144 of the Limitation Act of 1877. In *Nagar v. Saudagar* ⁽⁴⁾ it was held that there was no time limit for the foreclosure of a mortgage by conditional sale, and that a mortgagee in possession was entitled to take out such proceedings at any time during the subsistence of his mortgage, and the learned Judges who decided the latter case distinguished the former on the ground of possession. Our own Court in *Murlidhar v. Kanchan Singh* ⁽⁵⁾, although the case of *Buldeen v. Golab Koonwer* ⁽⁶⁾ was referred to by the learned Subordinate Judge in his judgment held that in a suit for foreclosure upon a mortgage by conditional sale executed in 1846, the plaintiff's remedy was barred

(1) 9 O. Cal., 147.

(2) [1888] I. L. R. 16 Cal., 693, at p., 700; 16 I. A., 85.

(3) [1899] 35 P. R.

(4) [1908] 115 P. W. R., 57, P. R.

(5) [1888] I. L. R., 11 All., 144.

(6) [1867] N.-W. P. H. C. (F. B.), 102.

by reason of Act XIV of 1839 during the currency of that Act, and that the time within which he was entitled to maintain an action for foreclosure, if he had taken the proper proceedings, expired in 1863. The learned Judges disregarded the distinction drawn by the Calcutta High Court in cases in which the mortgagee was entitled to possession in default of payment on the due date and the cases in which he was not. They said :—"It now appears that no proceedings were taken under that regulation. But even if they had been taken we should be prepared to hold that the cause of action was the original non-payment of the money on the due date, and that the provisions in Regulation XVII of 1806, which was passed for the protection of the mortgagor could not create a fresh cause of action."

In *Karimdad Khan v. Mustaqim Khan*⁽¹⁾, the view taken in *Murlidhar v. Kanchan Singh*⁽²⁾ was accepted and the case of *Buldeen v. Golab Kconwar*⁽³⁾ was sought to be distinguished on a ground which is difficult to follow.

We, however, are bound by the ruling of the Privy Council in *Srinath Das v. Khetter Mohun Singh*⁽⁴⁾ and must hold that the cause of action in the case before us arose on the failure to pay the mortgage money on the due date, *i. e.*, the 18th of September, 1850, that the mortgagors' right to possession of the property mortgaged was extinguished under section 1, clause (12), Act XIV of 1859, as soon as twelve years had elapsed from the due date, and that the subsequent creation of foreclosure suit could not revive the extinct right. Section 31 of the present Limitation Act (IX of 1908) has, therefore, no application and the suit is barred by article 135 of the present Limitation Act, corresponding with article 135 of the Limitation Act of 1877.

The result is that the appeal fails and is dismissed with costs including in this Court fees on the higher scale.

(1) [1903] I. L. R., 26 All., 4

(2) [1888] I. L. R., 11 All., 144.

(3) [1867] N.-W. P. H. C. (F. B.), 102

(4) [1888] I. L. R., 16 Cal., 693, at p. 700; 16 I. A., 85.

Appeal dismissed.

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Adverse possession—*Tenants-in-common*—*Ouster, how presumed.*

To constitute adverse possession as between tenants-in-common there must be an exclusion or ouster. Ordinarily sole possession by one tenant-in-common maintained continuously for a long period without any claim or demand by any person claiming under the other tenant-in-common is evidence from which an actual ouster of the other tenant-in-common may be presumed.

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Agra Tenancy Act (No. II of 1901)—*sections 20 and 21—Mortgage of occupancy holding in favour of the zamindar—'Fordable'—Meaning of.*

Section 31 of the Tenancy Act is not intended to affect the express provisions of section 20 of the Act, that the interest of an occupancy tenant is not transferable except as between certain persons. It is well known that the provisions of section 9 of the old Rent Act of 1881 and of section 20 of the present Act, were enacted in the interest as much of the tenant as of the landlord. An occupancy tenant is not competent to transfer his interest to his landlord otherwise than in the manner provided in the Act, namely, by relinquishment of the holding.

Held also, that a simple mortgage by an occupancy tenant of his interest in his holding in favour of his landlord is void whether made before or after the Tenancy Act.

BADRI MALLAH v. SUDAMA MAL 176

—*Local, section 22—Lineal descendant—Adopted son.*

An adopted son in the eye of the Hindu law has just the same rights as a natural born son, and is a lineal descendant within the meaning of section 22 of the Agra Tenancy Act.

LALA v. NAHAR SINGH 299

—*sections 67, 197—Landlord and tenant—Whether suit of one nature may be converted into one of a different nature—Agreement by tenant to pay higher rent if he failed to quit after the stipulated period of lease—Agreement unlawful.*

There is nothing in section 197 of the Agra Tenancy Act which justifies a court in turning a suit of one description into a suit of a totally different description. What a District Judge is bound to do under that section is to dispose of the appeal before him, as if the suit had been instituted in what would, in his opinion, have been the right court to try the same.

The lease granted by a landlord to his tenant contained a clause to the effect: "That at the end of 1314 Fasli the defendant would peacefully vacate the land without raising any objection, and that in the event of his failing to do so, he should be liable to pay rent thereafter at the rate of Rs. 400 per annum."

Seem, a contract in the particular form taken by the lease is open to the objection under the provisions of section 23 of the Indian Contract Act; and that the particular stipulation by which the defendant purported to bind himself to pay rent for the land in suit at the rate of Rs. 400 per annum for an unspecified future period, and avowedly as a penalty in the event of his failing to give up possession voluntarily is "unlawful" within the meaning of that section, as being of such a nature that, if permitted, it would defeat the provisions of section 67 of the Tenancy Act.

SANWAL KUNWAR v. MURLI 52

Agra Tenancy Act (II of 1901),

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RAM NARAIN SINGH v. RAMPAT BHAGAT	178
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See Jurisdiction—Civil and Revenue Court	468
section 164—Suit against lambardar by co-sharers—Burden of proof shifts when negligence proved—N. W. P. Rent Act (XII of 1881), section 209.	
Where in a suit for his share of his profits by a co-sharer against the lambardar under section 164 of the Tenancy Act it is proved that a very large percentage of the rent remained uncollected and the lambardar admitted that he had kept no accounts and had not had all collections entered in <i>patwari's sialha</i> , held that under the circumstances it was for the lambardar to explain why so large a sum remained uncollected and that the plaintiffs had been rightly given a decree for profits calculated on the demand.	
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section 202—Not applicable to cases where the revenue court decision will have no effect on the decision of the civil court.	
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Appeal against preliminary decree—Final decree passed during pendency of appeal—Cross-objections filed against final decree—Appeal against preliminary decree maintainable.	
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Held, that the plaintiff having filed cross-objections against the final decree it was <i>sub judice</i> when the plaintiff's appeal against the preliminary decree came on for hearing, and consequently the plaintiff's appeal was not barred.	

Appeal (concluded)

Per RICHARDS, C. J.—The final decree depends upon the preliminary decree, and that if an appeal is taken to the preliminary decree and succeeds, the final decree necessarily falls with the reversal of the preliminary decree upon which it depends. *Kuriamal v Bishambhar Das*, 32 All., 225, and *Narasn Das, v. Balgobind* 8 A. L. J. R., 604, distinguished.

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Act (XI of 1859), sections 2 and 3—Revenue sale—Bengal land—Revenue Sales Bengal Act VII of 1868—Tenure rent—Revenue—Annual jumma—Date of payment fixed by kabulyat—The same fixed by Board of Revenue—Ordinary date of payment—Date of “the settlement”—Arrears—Latest date of payment—Rule 7 of part III, clause 16 of Survey and Settlement Manual—Sale before the latest date of payment of arrears. Contract—Statute applicable thereto—Variation—General consideration—Administrative rules.	
There can be no variation of a contract and the statutory provisions applicable thereto by reason of general considerations or administrative rules which have not the sanction of statute.	
By virtue of section 3 of Act XI of 1859, the Board of Revenue published in 1871, a notification fixing “the 28th June of each respective year as the latest date of payment of rents of all description of tenures” in a <i>khas mahal</i> . By a <i>kabulyat</i> executed in 1874, by a tenant of a holding in the <i>khas mahal</i> it was stipulated that he “shall pay the said <i>jumma</i> in the Collectorate within the 28th day of June every year”. On March 16th, 1903, the holding was sold for arrears of revenue for 1902;	
<i>Held</i> , that (1) under Act XI of 1859, section 2, which applied, the rent payable under the <i>kabulyat</i> , on June 28th, 1902, was not in arrear till the 1st of July, 1902, on which date by virtue of the provisions of the Bengal Act VII of 1868, it must be “considered as an arrear of revenue”;	
(2) Whatever might be the ordinary date of payment, or secondly, whatever might be the date when “the settlement” was made, or thirdly, whatever be the provisions of the survey and settlement manual, it was not legitimate, by reason of any one or all of those things, to vary the actual date of payment in the <i>kabulyat</i> , which was the 28th June, or the actual date when a past due payment should be considered as an arrear, which was by Act XI of 1859, the 1st July, 1902;	
(3) Rule 7 of Part III, clause 16, of the Survey and Settlement Manual did not apply;	
(4) The notification of 1871 must, having regard to section 3 of Act XI of 1859, which authorised it, be applied to the holding in question as fixing the 28th June, 1903, as the date on which, if arrears were not paid, the holding could be sold;	
(5) The sale on March 16, 1903, must be set aside.	
<i>Balkishen Das v. Simpson</i> , L. R., 25, I. A., 151; s. c., I. L. R., 25 Cal., 833, referred to.	
BUKSH ELAHI <i>v.</i> DURLAV CHANDRA KAR. P. C.	472
Benami transaction—Suit against certified purchaser—Suit not maintainable	
See Code of Civil Procedure, 1908, section 66	67

Burden of proof—deed—pardanashin lady—Practice—Code of Civil Procedure (Act XIV of 1882), section 596—Concurrent findings of fact—Question of law—Elementary materials for arriving at conclusion not set out in the judgment.

It rests upon those founding upon a deed granted by a *pardanashin* lady to establish that she understood its effect and that the deed was intelligently and properly executed by her.

Tacoorddeen Tewarry v. Nawab Syed Ali Husain Khan, [1874] L. R., 1 I. A., 192, at p. 206 ; s. c. 13 B. L. R., 427.

Shambati Koeri v. Jago Bibi, [1902] L. R., 29 I. A., 127, at p. 131 ; s. c., I. L. R., 29 Cal., 749, followed.

Where in an appeal the findings of fact were concurrent, but it was contended that a question of law was involved, *viz.*, that the judgment of the trial Judge showed that he had misdirected himself inasmuch as certain materials for arriving at a conclusion had not been set out in the narrative which the judgment contained :

Held, that those materials were of the most elementary character and there was no ground for suggesting that the Judge had not taken them into consideration :

Held, also, that it would be to misconstrue entirely the provisions of section 596 of the Code of Civil Procedure (Act XIV of 1882), as to concurrent findings of fact if the Judges of India were to have impliedly the duty laid upon them of making their narrative of the circumstances minutely and completely exhaustive, under the penalty that if they failed to do so, the absence from their mind of elementary considerations might be presumed.

Karuppanan Servai v. Srinivasan Chetti, [1901] L. R., 29 I. A. 38 ; s. c., I. L. R., 25 Mad., 215, followed.

SAJJAD ALI KHAN v. WAZIR ALI KHAN P. C. 864

Mortgage-bond—Proof of execution and payment of consideration—Evidence—Recital in instrument.

G executed a mortgage-deed in favour of R. G sold the property to L. The mortgage-deed contained an admission of the receipt of consideration which consisted of old debts. The heirs of R brought a suit upon their mortgage, and impleaded G and L. G admitted execution, but denied receipt of consideration, but L denied both: *Held*, whether the admission of G contained in the deed was evidence against L or not, nevertheless the burden of proof was primarily on the plaintiffs to establish payment of consideration and as against the transferee who was no party to the bond and had no sufficient knowledge of the circumstances under which the document was executed that admission was of very little value and was insufficient to shift the burden of proof on to the transferee.

LALAK SINGH v. AJUDHIA PRASAD 108

Suit against lambardar by co-sharers—negligence.

See Agra Tenancy Act 1901—Sec. 164 529

See Code of Civil Procedure 1908, Order 21 Rule 23 190

See Evidence, Act Sec. 114 373

See Mortgage—Redemption 344

Bundelkhand Encumbered Estates Act [Local] (No. 1 of 1903), sec. 13—Some of the mortgagors taking advantage of the relief granted by the Act—Effect against other mortgagors.

The failure of the mortgagee to make any claim against those of his mortgagors who had obtained the benefit of the Bundelkhand Encumbered Estates Act, in a case in which some of the mortgagors had, while others had not obtained this benefit, could not put the mortgagee in a worse position than he would have occupied if he had allowed the integrity of the mortgage to be broken up by permitting the holders of a share in the equity of redemption to redeem that share on payment of a proportionate amount of the debt. *Amar Chand v. Tulshi Ram*, S. A. No. 858 of 1911 (unreported), decided on the 17th May, 1912, followed.

POHKAIR SINGH v. RAM DIN. 171

Certified purchase—Suit against—successor in title of benamidar—suit not maintainable.

See Code of Civil Procedure, 1908, sec. 66 97

Code of Civil Procedure (Act XIV of 1882) sec. 13 Explanation II

See Companies Act (VI of 1882) Sec 6 486

—Sec. 149—Power of the court to frame issues after close of arguments.

Held, that a trial Judge is fully empowered to frame an issue after the close of the arguments and decide the case on it under section 149 of the Code of Civil Procedure (Act XIV of 1882), the first part of which section leaves it in the discretion of the court to frame such additional issues as it thinks fit, whilst the latter makes it imperative on the Judge to frame such additional issues as may be necessary to determine the controversy between the parties, and that even had there been no such express provision in the Code, every court trying civil causes has inherent jurisdiction to take cognisance of questions which cut at the root of the subject-matter of controversy between parties.

SHAMU PATTAR v. ABDUL KADIR RAVUTHAN P.C. 259

—sections 584 and 585—Second Appeal—Construction of documents—Zamindar and tenant—Rights of zamindar in respect of houses and grove lands—Wajib-ul-arz.

The right construction of documents is a question of law which Judges in second appeal are not, by sections 584 and 585 of the Code of Civil Procedure (Act XIV of 1882), precluded from considering by any finding of a lower appellate court, based on such documents.

When a Subordinate Judge arrives at findings of fact by inferences drawn upon incorrect construction of a *wajib-ul-arz*, the Judges in second appeal are not bound by such findings of fact.

Held further that the *wajib-ul-arz* was cogent evidence of the rights as they existed when it was made of those holding proprietary or other rights of property within the mauza, and in it neither the plaintiffs nor any predecessors of theirs were shown as tenants who had special rights which were heritable and transferable.

Kishan Kunwar v. Fateh Chand, 1. L. R., 29 All., 203, affirmed.

FATEH CHAND v. KISHEN KUNWAR. P. C. 335

—Sec. 622.

See Code of Civil Procedure 1908—sec. 115 130

—(Act V of 1908), section 2—Mesne profits, definition, of—Interest included, whether mentioned or not.

Where a decree awards mesne profits but is silent as to interest on the mesne profits so awarded, *held* that mesne profits included interest on such profits.

BANWARI LAL v. MUSAMMAT RAMA 583

—Sec. 2.

See —Appeal— 78

—section 11, Explanation II.—Res judicata—Previous suit deciding question of title of the nature cognizable by a Court of Small Causes—No appeal from the decision—

A suit was brought for damages on account of the fruit of a certain grove. The suit was dismissed as the plaintiff had no title to the grove. This suit being of the nature cognizable by a Court of Small Causes, no second appeal lay. In subsequent suit for possession of the same grove, and damages on account of the fruit, *held* that the suit was barred by rule of *res judicata* by virtue of the decision on the question of title in the previous suit and it was immaterial under section 11, Explanation II, of the Code of Civil Procedure, that no second appeal lay in the previous suit.

MURADPI LAL v. JWALA PRASAD 166

Code of Civil Procedure (Act V of 1908),

<i>section 47—Decree—Execution of decree.</i>	
The words of section 47 of the Code of Civil Procedure are no doubt very wide, and if taken in their literal sense will cover every order of an interlocutory nature that may be passed in execution proceeding. But that does not seem to have been the intention of the legislature.	
<i>Held</i> , therefore, that an order which determines merely an incidental question as to whether the proceedings are to be conducted in a certain way does not come within the purview of section 47.	
Observations of BANERJI, J. in <i>Jogodishury Deba v. Kailash Chandra Lahry</i> , [1897] I L. R., 24 Cal., 725, followed.	
SAIYED MUKHTAR AHMAD v. MUQURAB HUSAIN	56
<i>section 64, Order 21, Rule 5—Attachment—Striking off of execution proceedings, effect of.</i>	
The attachment of a property cannot be deemed to be withdrawn when satisfaction of the decree in part only is certified to the court especially when the satisfaction in part is due to the payment of the money attached.	
KHUB CHAND v. NIADAR MAL	165
<i>section 66—Suit against certified purchaser—Successor-in-title of benamidar—Suit not maintainable.</i>	
Section 66 of the Code of Civil Procedure is intended to preclude the institution of a suit against the certified purchaser by the beneficial owner or the successor-in-title of the beneficial owner.	
NARAIN DEI v. DURGA DEI	97
See. 105.	
See Code of Civil Procedure Sec. 115	130
<i>section 115—Scope of Section—Interlocutory order—Revision.</i>	
An application under section 115 of the Code of Civil Procedure cannot be entertained in the case of those interlocutory orders against which, though no immediate appeal lies, a remedy is supplied by section 105, which provides that they may be made a ground of objection in appeal against the final decree.	
There were no words in section 622 of the Code of Civil Procedure, 1882, nor are there any in section 105 of the present Code (1908), limiting the right of attack to such orders only as are "affecting the decision of the case" with reference to its merits, and in the absence of any such limitation a court has no power to read such a limitation into the section.	
NAND RAM v. BHOPAL SINGH	130
<i>section 115, Order LX, Rule 9, Order XLIII, Rule 1 (c)—Suit dismissed for default—Application for restoration—Cessation of jurisdiction by reason of cession of territory—Application returned for presentation to proper court—Whether revision lies against order.</i>	
A suit was brought to recover a sum of money in the court of the Munsif of Mirzapur. The suit was dismissed for default. Application was made for restoration. Notice was issued thereupon, and a date was fixed for the hearing of the application. In the meantime, the place where the parties resided was transferred to, and became part and parcel of a native state. The application was returned by the Judge to be presented to the proper court. <i>Held</i> , that the order being in effect a refusal of the application for re-hearing it was appealable under Order XLIII, Rule 1 (c) of the Code of Civil Procedure and consequently no application for revision would lie.	
SHEO TAJAL v. KASIM	41
<i>section 148—Power of the court to extend time fixed by the decree—Appeal.</i>	
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Code of Civil Procedure (Act V of 1908),	
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<i>Jug Ram v. Jwa Ram</i> 6 A. L. J. R. 647, <i>Hukum Chand v. Hayat</i> , [1912] 121 P.	
W. R., <i>Narendra Bahadur v. Ayudhia Prasad</i> , 13 O. C., 28, approved. <i>Rahima</i>	
<i>v. Naipal Rai</i> 14 All., 520. followed.	
SUBANJAN SINGH v. RAM BAHAL LAL	520
-----section 230—Decree upon compromise against the	
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had hypothecated. The decree was put into execution as a simple money decree	
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section 230 of the Code of Civil Procedure of 1882 applied, and the decree could	
not be executed after the expiration of 12 years from the date thereof.	
MAHARAJA OF BENARES v. LALJI SINGH	256
-----Order 1, Rule 3—Grounds for adding parties.	
By a compromise between S. K. and L. the latter was to get 1/8th of some	
property as her share of inheritance and she was to remain in possession of 7/8th	
in lieu of dower. L made a gift of the property to I, who mortgaged it to	
C. L. After the death of L., S. K. claimed 7/8th of the property as against I.	
After the institution of the suit, I sold the property to C. L. in lieu of the	
mortgage. C. L. applied to be made a party to the suit as defendant. <i>Held</i> ,	
that as no relief was sought against the applicant and the case against the	
applicant was not the same as against the defendants already on the record,	
his application was rightly rejected.	
OHIMMAN LAL v. SIKANDAR KHAN	387
-----Order I, Rule 9, Order XXXIV, Rule 1—Puisne	
mortgagee—Non-joinder of parties.	
On principle it is always desirable that all the necessary parties in a mort-	
gage suit should be before the court, so that all the rights and interests in the	
property may be settled once for all, and it is, therefore, the duty of the court to	
implead necessary parties.	
A suit, however, will not fail by reason of non-joinder of parties and the	
provisions of Order XXXIV, Rule 1 of the Code of Civil Procedure, are subject to	
the provisions of the Code which includes Order I, Rule 9.	
RAM CHARAN LAL v. MUHAMMAD RASHID-UD-DIN	134
-----order II, rule 2.	
See <i>Lambardar and co-sharer</i>	469
-----Order 9 Rule 9.	
See Sec. 115	41
-----Order 17, Rule 2—Plaintiff absent—Suit dismissed	
as not proved—Appeal.	
Where a suit is dismissed by an Assistant Collector by the following order :	
“ The plaintiff had failed to prove his case and has failed to prosecute his case,	
it is ordered that his case is dismissed for default ” <i>Held</i> that the Assistant	
Collector had not taken action under Order 17, Rule 2, of the Code of Civil	
Procedure and had dismissed the suit as plaintiff had failed to prove it and an	
appeal lay against the order of the Assistant Collector.	
CHUTTAN LAL v. KANHAYA LAL	478
-----Order 19, Rule 41—Restoration of appeal dismissed for	
default without notice—Valid—Order 9—Suit dismissed for default—Restoration of.	
When a suit is dismissed in the absence of both the plaintiff and the defend-	
ant, it can be restored on the application of the plaintiff without notice to the	
defendant.	

Code of Civil Procedure (Act V of 1908).—(continued)

Where at the hearing of an appeal neither party was present and it was dismissed but the order was set aside by the appellate court on a motion by the appellant without notice to the other side, *held* that the order of restoration was not erroneous.

BIRJ LAL v. BUA RAM	399
-----Order 21, Rule 5.	

See Sec. 64	165
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-----Order 21, Rule 23—Burden of proof.

It is not a good ground for passing an order of remand under Order XII, Rule 23 of the Code of Civil Procedure, to say that the preliminary issue has been decided by the court of first instance on a wrong view of the burden of proof, unless the appellate court also finds that that decision is wrong.

HABIBULLAH KHAN v. LALTA PRASAD	190
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-----Order 21, Rule 57—Attachment—Revival of, upon dismissal of decree-holder's application being set aside on review.

The assignee of a simple money decree applied for attachment of two classes of property, (1) property burdened with a mortgage in favour of the assignor, and (2) property not so mortgaged. The first court disallowed the judgment debtor's objection, but upon appeal it was allowed by the High Court and the application was dismissed *in toto*. The decree-holder, however, made an application for review, and a modified decree was passed dismissing the application for execution in respect of the mortgaged property alone. During the pendency of the application for review, the judgment-debtor had transferred the property to a third person. The lower court after receipt of the first order had sent the record to the record room:

Held that Order XXI, Rule 57 of the Code of Civil Procedure, did not apply as there was no default on the part of the decree-holder, and the decree-holder's application having been dismissed on review in respect of the mortgaged property alone, the application in regard to the non-mortgaged property was not touched, and the attachment on such property subsisted.

AZIZ BAKSH v. KANIZ FATIMA BIBI	48
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-----Order 34 Rule 1 See Order 1 Rule 9 ..	134
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-----Order 41, Rule 25—Issues referred for determination—Transfer.

Where issues have been referred by the appellate court, and before the findings were returned, the appellate court transferred the case to another court to whom the original court submitted the record, *held* that the decision was without jurisdiction.

Udit Narain Singh v. Jhanda, I. L. R., 15 All., 315. *Kumarasami v. Subbaraya*, I. L. R., 23 Mad., 314, followed.

THAKUR PRASAD RAI v. NARENDRA BAHADUR SINGH	89
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-----Order 43—Rule 1 (c) See Sec. 115 ..	41
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-----Order 47, R. 7—Order granting a review—Dismissal of a previous application for restoration. Grounds for allowing an appeal.

A suit was dismissed for default and an application for its restoration was rejected. An application for review of judgment was granted, but on appeal the District Judge held that no review could be granted when an application for restoration had been rejected, *held*, that this was not one of the grounds upon which an appeal could be allowed under the provisions of Order 47, Rule 7, of the Code of Civil Procedure.

HAR NARAIN v. UMRAI	396
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-----Schedule II, rule 5(2), 8—Reference to arbitration—No order superseding arbitration—Jurisdiction of court.

A dispute was referred to arbitration, appointing two arbitrators and an umpire. The notices issued to the umpire and one of the arbitrators were returned unserved. The court, while issuing notices to the arbitrators, had

Code of Civil Procedure (Act V of 1908)—(concluded).

passed the order that if no award was filed within the period fixed, the parties were to be in attendance with their witnesses prepared to proceed with the case. No award was filed within the prescribed period, and the Subordinate Judge dismissed the suit: *held*, whether the order passed by the Subordinate Judge amounted to a dismissal for default or a decision against the plaintiff on the merits it was made without jurisdiction, having been passed in the absence of a proper order superseding the arbitration before the court proceeded to dispose of the case.

GANESH PRASAD v. DAMODAR DAS 23

Code of Criminal Procedure (Act V of 1898), section 96 and Form VIII of Schedule V—
Power of a Magistrate to issue search warrant—Court—Magistrate—Indian Arms Act
(No XI of 1878), section 25.

Held, reversing the High Court, that the Code of Criminal Procedure (Act V of 1898), uses the terms "Court" and "Magistrate" generally if not always as controvertible terms, and that Form VIII of Schedule V of the Code, contemplates the issue of a search warrant by a Magistrate under section 96 of the Code, before any proceedings of any kind are initiated under the Code before him and in view of an "inquiry about to be made" by him under the Code.

Held, affirming the High Court, that the words "having first recorded the grounds of his belief" in section 25 of the Indian Arms Act (No. XI of 1878), prescribe a preliminary condition, and that a Magistrate has no power to make a search under that section without having complied with that preliminary condition.

LOFTUS OTWAY CLARK v. BROJENDRA KISHORE ROY CHOWDHURY P.C. .. 192

-----section 107—Security to keep peace—Pro-
cedure to be followed.

Persons who are bound over to keep the peace should be given an opportunity of showing cause and all the procedure laid down by chapter VIII of the Criminal Procedure Code should be followed.

JAGADAMBA PRASAD v. KING-EMPEROR 353

-----section 110—Suspected persons.

Section 110 of the Code of Criminal Procedure is not intended to afford the police a means of keeping the suspected person under detention until they are able to work out a case against him. A Magistrate should not detain a person under that section unless he has the necessary information upon which he can make the order in writing required by section 112.

KING-EMPEROR v. PAMMAL NAI 351

-----sections 110, 117, para. 2 and section 540.

In a case under section 110 of the Criminal Procedure Code where the evidence for the defence is equally good with that for the prosecution, the accused are entitled to an acquittal.

Under para. 2 of section 117 of the Code of Criminal Procedure, a case under section 110 of the Code of Criminal Procedure is to be conducted as if it were a warrant case and the procedure to be observed in the trial of warrant cases is laid down in sections 251 to 256 of the Code of Criminal Procedure. According to the said sections, an accused cannot be called upon to enter on his defence until the prosecution closes its case. No further evidence can be admitted against the accused except under section 540 for which there must be valid reasons which must be recorded.

GANGA SINGH v. KING-EMPEROR 483

-----section 118—Security for good behaviour—

Reasons for rejecting sureties.

In a case under section 118, Code of Criminal Procedure, a Magistrate rejected certain sureties on the ground that they did not live within a radius of five miles of the place where the accused person lived. *Held*, that the order was bad and there was no valid ground for rejecting the sureties.

HASIN-UD-DIN v. KING-EMPEROR 354

Code of Criminal Procedure (Act V of 1908)—(continued.)

sections 145, 148—Referring of issues raised in the case to subordinate court—Illegal.

Where in proceedings under section 145 of the Code of Criminal Procedure the issues raised were referred to a subordinate court for enquiry and the Magistrate acted on the report, *held* that the Magistrate could not refer under section 148 of the Code the only issues raised and decide the case without examining any witness merely on the report of the subordinate court.

PITAMBER LAL v. SARDA PRASAD 465

sections 145, 526—"Criminal case", meaning of—High Court's power to transfer.

In the absence of anything to the contrary every case over which a criminal court exercises jurisdiction under the Criminal Procedure Code is a *criminal case* for the purposes of that Code. The expression 'criminal case' in section 526 includes a proceeding initiated under section 145 of the Code and that the High Court under section 526 has power to transfer it from one court to another court subject to all the conditions under which a transfer can be made.

An 'accused person' is one over whom a criminal court exercises jurisdiction.

In re Pawlurang Gonnal Pyari, [1900] I. L. R., 25 Bom., 179, not followed.

JAGGU AHIR v. MURLI SHUKUL 27

—Sec. 148..

See Sec. 145 465

—Sec. 177.

See jurisdiction—Criminal cases 431

section 179—Criminal misappropriation—Principal firm at Cawnpore—Branch firm at Gauriganj—Offence committed at Gauriganj—Jurisdiction.

The word 'consequence' in section 179 of the Criminal Procedure Code means a consequence which forms a part and parcel of the offence. It does not mean a consequence which is not such a direct result of the act of the offender as to form no part of that offence.

Hence where an accused misappropriated money belonging to the complainant's branch shop at Gauriganj which money was to be sent to the principal shop at Cawnpore owned by the complainant, *held* that the courts at Cawnpore had no jurisdiction to proceed with the case.

GANESHI LAL v. NAND KISHORE 45

—section 195 (1).

See Penal Code 1860, sec. 182.

section 195 (c)—Complaint.

A Munsif found that a document filed in a case before him was tampered with. He wrote to the District Judge who wrote to the District Magistrate to take action in the matter. *Held* that the letter of the District Judge was a complaint within the meaning of section 195 (c), Criminal Procedure Code. *Emperor v. Sunder Sarup*, I. L. R., 26 All., 514, followed.

DEBI PRASAD v. KING-EMPEROR 361

section 195 (c)—Sanction to prosecute for forgery—Offence before any proceeding—No sanction required.

By section 195, clause (c), Criminal Procedure Code, courts are prohibited from taking cognizance of an offence described in section 463, Indian Penal Code, when such offence has been committed by a party to any proceeding in any court in respect to a document produced or given in evidence in any such proceeding. The section does not remove from the cognizance of criminal courts an offence described in section 463 when such an offence has been committed by an ordinary

Code of Criminal Procedure (Act V of 1898).—(continued.)

individual. As long as the prosecution is confined to offences connected with a document committed prior to its production in court, such prosecution is within the law and requires no sanction. Sanction is required for offences committed by a party to a proceeding in any court in respect to a document produced or given in evidence in such proceeding.

LALTA PRASAD v. KING-EMPEROR 294

—sections 195, 476—*Judicial proceeding.*

When a case under section 195 of the Code of Criminal Procedure is taken up to a higher court in revision, the proceedings in the higher court relating to sanction are undoubtedly judicial proceedings. The function exercised by the higher court in upholding the order of the court below or reversing it, is, beyond doubt, a judicial act.

CHADAMMI v. LALTA PRASAD 174

—sections 200, 202—*Duty of Magistrate—Further enquiry.*

The duty of Magistrate receiving a complaint is set out in section 200 of the Code of Criminal Procedure, and consists in finding out whether there is any matter which calls for investigation by a Criminal Court. The investigation which he is to make must be conducted by him personally and cannot be passed on to another, and section 202 is clear on the point.

BATJ NATH v. RAJARAM 79

—section 203, section 437—*Complaint summarily rejected—Further enquiry could be ordered without notice to accused.*

“A notice to a person against whom a complaint is made is quite unnecessary where it is sought to set aside the summary order in a proceeding to which he was actually no party.”

ANGAN v. RAM PIRBHAN 531

—sec. 208.

The wording of section 208 of the Code of Criminal Procedure makes it clear that the intention of the Code was that as each witness was examined, he should be then and there cross-examined and re-examined and allowed to go home. The Code has considerations for witnesses and their convenience, but this consideration is not always shared by Magistrates.

DURGA DATT v. KING-EMPEROR 144

—sections 208, 256, 430 Chs. XVIII, XXI;
Procedure in cases triable by court of session—Revision—

Ordinarily the High Court is most unwilling to interfere with interlocutory orders in revision, but it will do so where it is abundantly clear that the court below has not adopted the procedure prescribed by law but has followed a procedure of its own.

DURGA DATT v. KING-EMPEROR 144

—section 263 (b)—*Statement of reasons for conviction to be recorded.*

Under section 263 (b) of the Code of Criminal Procedure a brief statement of reasons for conviction must be given. These reasons should amount to showing that there is evidence to prove the existence of the ingredients necessary to complete the offence.

BRJIBASI LAL v. KING-EMPEROR 251

—Sec. 437.

See Sec. 203 531

—Sec. 439

See Sec. 208 144

Code of Criminal Procedure (Act V of 1908)—(concluded.)

sections 476 and 537—Notice—Want of notice, an irregularity—Ground for reversal.

Section 466 of the Criminal Procedure Code nowhere says that notice in proceedings under that section shall be given to a person who is immediately concerned thereby. Want of notice under that section is an irregularity in procedure.

The High Court always looks with disfavour upon an order made under section 476 without notice being given to the persons immediately concerned. At the same time any irregularity in the proceedings taken under section 476 is not a sufficient ground for either reversing or altering an order passed by a court of competent jurisdiction.

RAM PIARI RAI v. KING-EMPEROR 247

—sec. 476.

See Sec. 195 174

section 526—Circumstances under which transfer allowed.

What the court has to consider in an application to transfer a criminal case is not merely whether there has been a real bias in the mind of the presiding Magistrate against the accused but also the further question whether incidents may not have happened which, though susceptible of explanation, and which would perhaps pass unnoticed but for the trial he is undergoing would alarm him and lead him to think that his conviction is a foregone conclusion. Where, therefore, the District Magistrate refuses an interview to an accused person and cancels his license to carry arms though the circumstances are not enough to show that the Magistrate is prejudiced against the accused yet are sufficient grounds for transfer from the district.

Farzand Ali v. Hanuman Prasad, I. L. R., [1896] 19 All., 64, followed.

RAM KISHAN DAS v. KING-EMPEROR 357

—sec. 526.

See sec. 145 27

section 537—Judgment at variance with directions given by law—Defect not cured.

Section 537 of the Code of Criminal Procedure does not cure the defects in a judgment which was at variance with the directions given by law and materially prejudiced the appellants at the trial of the appeal.

KANHAI SINGH v. KING-EMPEROR. 485

—sec. 537

See Sec. 476 247

—schd v. Form 8

See Sec. 96 192

—Chap. 21

See Sec. 208 144

—Chap. 38

See Sec. 208 144

Contract—Agreement to pay rasum zemindari in addition to cash—Against public policy.

See Landlord and tenant 416

—in Restraint of marriage.

See Contract Act 1872, Sec. 24 185

—salutary rules applicable to it—Variations thereof on administrative grounds—Validity.

See Bengal Land Revenue Sales Act 1859 472

Contract. —(continued.)

-----Unconscionable bargain—Mortgage fixing 58 years for redemption.

Held, that a covenant in a mortgage-deed fixing 58 years for the mortgagor to redeem the mortgaged property was not, in the absence of fraud or duress, hard and unconscionable.

RAM PRASAD v. JAGRUP 157

Contract Act (IX of 1872), section 23—Unlawful consideration—Marriage brokerage contract.

A contract whereby a person promises to give his daughter in marriage to another in consideration of a sum of money, is opposed to public policy and cannot be enforced especially when the circumstances amount to a sale of the girl by her parents in consequence of want of money.

GIRDHARI SINGH v. NEELADHAR SINGH 159

-----Sec. 32.

See Agra Tenancy Act 1901 Sec. 67 52

-----sections 23, 27—Agreement to share profits—Whether restraint of trade.

An agreement, whereby certain persons fixed the rates to be charged for ginning and baling cotton, thus forming a combination, and further agreeing that they would share the profits in a certain way, was *held* to be neither in restraint of trade nor opposed to public policy.

Haribhai v Sharaf Ali, 1. L. R., 29 Bom., 861, and *Fraser & Co., v. The Bombay Ice Manufacturing Co.*, 1. L. R., 29 Bom., 107, referred to.

KUBER NATH v. MAHALI RAM 117

-----secs. 24 and 26—contract in restraint of marriage.

An agreement, the consideration for which was that the plaintiff relinquished on her part certain claims she had by inheritance to property in the hands of the defendants who, in return, promised to pay her a certain sum of money by way of maintenance, but who, at the same time, qualified their promise by saying that they would not continue the payment in the event of her marrying again, unless, indeed, she married a son of one or other of themselves, was *held* not to be void as being in restraint of marriage.

There is nothing illegal in a covenant to pay a woman certain annuity until death or marriage or during widowhood.

MUHAMMAD HASAN v. NOOR JAHAN 185

-----sec. 27.

See Sec. 23 117

Companies Act (VI of 1882), section 6—Company—Registration—Memorandum of Association—Certificate of Registrar—Conclusiveness of the certificate—Res judicata—Code of Civil Procedure Act (XIV of 1882), section 13, Explanation II.

The use of the word "otherwise" in section 6 of the Indian Companies Act (VI of 1882) shows that the statutory condition that the memorandum of association must be signed by seven persons is as much as a condition of registration as any other requisition to be found in the Act which is preliminary to registration and apparently essential, and the certificate of incorporation granted by the Registrar under the Act is conclusive that all requisitions of the Act in respect of registration have been complied with.

The validity of certain conveyances to a Company registered under the Indian Companies Act, 1882, was established in a suit brought against the Company and others by the plaintiff, who subsequently brought another suit against the same parties to have it declared that the Company was not duly incorporated and that the property conveyed to it should be transferred to "the persons entitled to the same": *Held*, that the question of the validity of the incorporation of the Company might and ought to have been made a ground of attack in the first suit, and that the second suit for that purpose was barred as *res judicata* under section 13, Explanation II of the Code of Civil Procedure (Act XIV of 1882).

Kameswar Pershad v. Rajkumar Ruttun Roer, L. R., 19 I. A. 234; S. C. I. L. R., 20 Cal., 79 followed.

MOOSA GOOLAM ARIFF v. EBRAHIM GOOLAM ARIFF P. C. 486

Compromise—Family arrangement—Settlement of doubtful rights—Life tenant—Reversioners bound.

Held that a compromise in the nature of a family arrangement, entered into by a life-tenant selling doubtful rights which is fairly and properly obtained from her, is binding on the reversioners who are no parties to such arrangement.

MADAN LAL v. CHUTTAN SINGH	101
Court of Wards Act (IX of 1879) (Bengal) section 10a and 10.	
See Court of Wards Act 1899 (U. P.) Sec. 16	234

—————(III of 1899 U. P.) sections 16, 17, 18, 20—Bengal Court of Wards Act (IX of 1879), sections 10A., 10B.—Interpretation of Statutes—Discretion—Non-production of documents before Collector upon notice—Objection not taken in proper time.

Sections 16, 17, 18 and 20 of the U. P. Court of Wards Act considered and compared with sections 10A and 10B of the Bengal Court of Wards Act. *Barrow v. Gya Prasad*, 9 A. L. J. R., 558, distinguished.

Provisions of law which operate so as to impose a penalty or disability upon a person who fails to comply with them must be strictly interpreted.

The provisions of the U. P. Court of Wards Act lay upon creditors the obligation to produce detailed statements of claim, accompanied by all necessary documents, within the period limited by the notice under section 16, where a claim is not so notified, the law leaves no discretion to the court and under section 18 no interest can be allowed from the date of the expiry of the period prescribed in section 16.

In the absence of general orders issued by the Board of Revenue or any special orders, the Collector is under no obligation to do anything more than get the notice under section 16 published in English and in the Vernacular in the Provincial Gazette.

It would be contrary to all sound principles of interpretation to apply the proviso embodied in section 17, clause 2, to the subsequent sections 18 and 20.

Where, however, the admission of documents of title in evidence was not challenged at the proper time, and, strictly speaking, was not challenged at all, and the court below had no real opportunity at the late stage, when the objection was raised, to turn round on the plaintiffs and call upon them to explain the non-production of their mortgage-deeds before the Collector, *held* that to exclude the documents altogether from the record would be to exact an extreme penalty for a piece of neglect due to mere ignorance. The provisions of section 20 leave the court a discretion to admit the plaintiff's documents of title in evidence despite their non-production before the Collector.

COLLECTOR OF GHAZIPUR v. BALBHADDAR SINGH	234
Custom—Hindu Law—marriage.	
See Hindu Law—marriage	181

—————Inheritance—Exclusion of daughter—Hela Jats.

As regards the succession of daughters among *Hela Jats* residing in the Muzaffarnagar district, the custom was alleged in the following terms: "Among all the members of the Jats the custom is that the daughters and their descendants do not in general get any share by right of inheritance out of the property left by the daughter's father." The *wajib-ul-ars* also recorded the custom in equally vague terms. The oral evidence disclosed that there were more instances of non-observance of the custom than of its observance. *Held*, that the custom was not proved.

LACHMI v. SANGRAM	135
—————marriage—Hindu Law—marriage of a Bannya and a woman born of connexion between a Brahmin male and a Bannya woman.	
See Penal Code, 1860, Sec. 490	82
—————Pre-emption.	
See Pre-emption—custom	70

Decree—determination of an issue—no decree.

See Appeal—Code of Civil Procedure, 1908 78

Document—attesting witnesses dead—how to be proved.

See Evidence Act 1872—Sec. 60 217

Easements Act (V of 1882), sections 15, 47—*Right of way—Prescriptive right.*

The fifth paragraph of section 15 of the Easements Act, which applies to both continuous and discontinuous easements seems to render it impossible to acquire a statutory prescriptive title to an easement unless and until the claim thereto has been contested in a suit.

SULTAN AHMAD v. WALIULLAH 227

Election petition—*Practice—Supplying particulars after petition presented—Amendment of plaint.*

A petitioner questioning the validity of an election is entitled to give evidence of additional cases of misconduct in the course of the election which are mentioned for the first time after the expiration of fifteen days prescribed by the rules for filing the application and the fact that the additional instances are given by means of amendment of plaint makes no difference.

There is nothing in the rule which requires a petitioner to specify all the particulars in the petition and it is enough if the ground mentioned is that the respondent was guilty of personation. The practice in England is to allow particulars of the charges to be furnished after the petition is presented and there is no reason why the same practice should not prevail in India.

NAWAB KHAN v. MOHAMMAD ZAMIN 289

Estoppel—*Simple mortgage—Denial of mortgagee's right by mortgagor's representative—Capacity in which right denied—Adverse possession—Trespass against mortgagor—Whether period runs against mortgagee.*

The representatives of a mortgagor are estopped from denying the mortgagee's title, but it is open to them as *mutavallas* to plead that property was *waqf* and that the mortgage of it was void.

Gulzar Ali v. Fida Ali, I. L. R., 6 All., 24, distinguished.

A simple mortgage is not merely a security for the debt but it is a transfer of an interest in the property mortgaged. Hence a trespasser who ousts a mortgagor under a simple mortgage, after the execution of the mortgage, and holds the property adversely to him, may by prescription become the owner of the limited estate which the mortgagor had in the property; but such adverse possession cannot extinguish the right of the mortgagee. *Trustees etc., Co v. Short*, 13 A. C., 793; *Smith v. Lloyd*, 9 Ex., 52; *Secretary of State v. Krishnamoni*, 29 Cal., 518; *Ismdar Khan v. Ahmad Husain*, 60 All., 119, referred to. *Ramaswami v. Poma*, 21 M. L. J. 397; *Partab Bahadur v. Maheshwar*, 12 O. C., not approved.

Asmdar v. Makhan, I. L. R., 33 Cal., 1015; *Parihasarath v. Lakshmana*, 21 M. L. J. 487, approved and followed. *Karan Singh v. Bakar Ali*, I. L. R., 5 All., 1, P. C., discussed.

NANDAN SINGH v. JUMMAN 278

—*Occupancy holding sold as fixed-rate tenancy—No objection by judgment-debtor in suit or in execution proceedings—Possessory title.*

Where an occupancy holding mortgaged as a fixed rate tenure was sold at auction, as such, and the decree-holder having purchased it, remained in possession thereof for eleven years, but was subsequently dispossessed by the judgment-debtor, held that the defendant was estopped from setting up the plea that the holding was an occupancy tenure and that the defendant having no title at all, the plaintiff was entitled to regain possession on the strength of his possessory title. Decision of RICHARDS, J., reported in 8 A. L. J. R., 404, reversed.

ASGHAR HUSAIN v. PAL AHUR 66

—mortgage of joint Hindu family property by one member—Mortgagor not entitled to set up the invalidity of the mortgage.

See Hindu Law—alienation 112

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Evidence—admissibility of—Mortgage deed—Proof execution and payment of consi- deration—Recital in instrument.	
See Burden of Proof	108
<i>Execution of a second mortgage deed in lieu of first—Suit on subsequent deed— Circumstances under which former deed executed—Proof of—Oral evidence.</i>	
In a suit for sale on a mortgage alleged to have been executed in lieu of a prior mortgage, the earlier mortgage deed was not produced but oral evidence was given to prove the circumstances in which the documents were executed, <i>held</i> that such evidence was admissible.	
RAM JAR SINGH v. BHAGALU SINGH	401
Evidence Act (I of 1872)—Sections 18, 21—Admissibility in—Statements in a mortgage deed—Representatives of mortgagor.	
“The recital in a deed is admissible as against the executant and as against persons who derive their interest in the subject matter of the suit from the executant. Sections 18 and 21 of the Evidence Act make the recital admissible in evidence against them also as admissions. The probative value of that admission is a different question.”	
NAWAL KUNWAR v. BAKHTAWAR SINGH	390
<i>section 69—Document required by law to be attested—Death of attesting witnesses—How to be proved.</i>	
The requirements of section 69 of the Evidence Act with reference to proving the attestation of at least one attesting witness when all the attesting witnesses are dead are sufficiently complied with by proof of the handwriting of the scribe and by the fact that some of the attesting witnesses sign by the pen of the scribe.	
KRISHNA JIVA TEWARI v. BISHNATH KALWAR	217
<i>section 90—Practice—Presumption—Evidence taken prior to presumption.</i>	
In practice a court does not generally decide whether it will make the presumption or not under section 90 of the Evidence Act until all the evidence in the case is before it.	
IBRAHIM v. RAM NARAIN	87
<i>section 114—Presumption—Burden of proof—Mortgage-suit— Production by defendant of bond with endorsement of payment—Decision cannot be founded on suspicion.</i>	
In view of the presumption under section 114 of the Indian Evidence Act (I of 1872) the production by the defendant of the mortgage-bond, on which the suit is based, with the endorsement of payment casts on the plaintiff the burden of establishing the affirmative proposition that the debt is still outstanding, in other words, of showing that the bond came in the defendants' possession by dis- honest means and that the signature to the endorsement was either a forgery or, in case the endorsement is signed by an agent, unauthorised.	
It is a settled principle that suspicion, though a ground for scrutiny, cannot be made the foundation of a decision. <i>Query</i> : Whether any question of <i>onus</i> remained after the parties had gone into evidence.	
MOHAMMAD MEHDI HASAN KHAN, v. MANDIR DAS, P. C.	373
Execution—Redemption decree—Deposit in court pending appeal by mortgagee—Lapse of deposit to Government.	
Where in execution of a redemption decree the mortgagor deposits in court an amount sufficient to satisfy the decree and the mortgagor is left into posses- sion, although an appeal against the decree by the mortgagee is pending, <i>held</i> that the mortgagee ought to take the amount deposited out of court without prejudice to his pending appeal either by arrangement or with the sanction of the court which would be given as a matter of course, and that if he fails to do so and the amount lapses to the Government, the mortgagee must bear the loss.	
CHAMPAT SINGH v. JANGAD SINGH P. C.	379
Grove—Transferability— <i>wajib-ul-arz.</i>	
See Land lord and Tenant—grove	73

Hindu-Law—Alienation—Joint family property mortgage by one member—Mortgage voidable—Mortgagor and mortgagee—Estoppel.

Held, that a mortgage by one member of a joint Hindu family of property belonging to the family is not void altogether, but is voidable at the instance of the persons whose rights are invaded by it, and that it is not open to a mortgagor as against his mortgagee to set up the invalidity of the mortgage.

BISHUMBHAR DAYAL v. PARSHADI LAL 112

—Inheritance—Mitakshara—Great-grandson of the grandfather—Grandson of the great-grandfather.

The author of the *Mitakshara* has generally used the word *putra*, wherever it occurs, in the sense of including two immediate descendants of the son in the direct line. The word *putra* used in the *Mitakshara* includes the grandson also. *Kahan Rai v. Ram Chandra*, I. L. R., 24 All., 128. *Rachava v. Kalingapa*, I. L. R., 16 Bom., 716, applied.

The line of descent is not limited to two descendants only in the case of the father and the grandfather.

According to the *Mitakshara* law the three descendants of the father being nearer *sapindas* than the three descendants of the grand-father and the three descendants of the latter being nearer than the three descendants of the great-grandfather, the three descendants of the father inherit before the descendants of the grandfather and his three descendants inherit before those of the great-grandfather. The great grandson of the grandfather is therefore a preferential heir as against the grandson of the great-grandfather.

BUDDHA SINGH v. LALU SINGH 303

—Widow—Gift to a remote reversioner—Consent by the immediate reversioner—Gift invalid—Registration Act (III of 1877), section 21—Sale-deed registered—Registration not a nullity by reason of want of clear specification.

Held, that a gift by a Hindu widow holding a life interest to a possible reversioner with the consent of the persons who would have taken the estate if she had died at the time, was invalid.

Held, further, that a sale-deed having been registered, the registration could not be a nullity for the reason that there was not a clear specification of the property within the meaning of section 21 of the Registration Act.

BENI MADHO SINGH v. JAGAT SINGH 33

—Joint family—managing member—presumption that the managing member acts on behalf of minor members.

In cases in which all the adult members of a joint family appear on the record as plaintiffs, the presumption is that they are acting as managers on behalf of themselves and of the minor members of the family who do not join in the suit.

KRISHNA JIVA TEWARI v. BISHNATH KALWAB 217

—Marriage—Nihang Goshains—Marriage of a Nihang Goshain formerly a Thakur with woman formerly a Brahman but had become a Nihang Goshain—Custom.

The marriage of a person who is a Thakur by caste with a woman of the Brahman caste, is forbidden by the Hindu law and the offspring of such union is not legitimate.

Padam Kumari v. Suraj Kumari I. L. R., 28 All., 458, referred to.

The fact that the couple had, before marriage, entered the same order of faith, namely, that of *Nihang Goshains*, is immaterial in the absence of evidence of a custom prevailing in that order which recognises union between any man and any woman of that order.

SESPURI v. DWARKA PRASAD 181

Hindu-Law—Marriage—marriage of Banya and a woman born of connexion between Brahmin male and a Banya woman.

See Penal Code, 1860, Sec. 490 82

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Inherent power of the court—Ex parte order—Setting aside.

Held that a court has power by a subsequent order to set aside an *ex parte* order passed by itself and to correct any mistake it may have made therein.

BALMAKUND v. ASHFAQ HUSAIN 140

Inheritance—Exclusion of daughters—Custom.

See custom 135

Immoveable property—Fruit treas.

See Transfer of Property Act, 1882—Sec. 3 516

Jurisdiction—Civil and Revenue Court—Matter between rival claimants to a tenancy—Agra Tenancy Act (II of 1901)—Section 96.

Where a dispute arises between rival claimants to a tenancy, the question of title to the tenancy is a question which is cognizable by a civil court and it is not a matter which can be determined under section 95 of the Tenancy Act.

JAGANNATH v. AJODHYA SINGH 408

—————Civil and Revenue Courts

See Landlord and Tenant. 85

—————Civil and Revenue Courts—Mortgagee in possession of fixed rate holding—payment of rent by him to the land holder—Tenant—dispossession.

See Agra Tenancy Act 1901 Sec. 79 178

—————Criminal cases—Indian Penal Code (Act XLV of 1860), section 406—Criminal breach of trust—Code of Criminal Procedure (Act V of 1898), section 177.

G. L. was entrusted with a machine at Bombay and had misappropriated it and the money made out of it. G. A., who claimed to be the owner of the machine alleging that G. L. had committed criminal breach of trust with respect to it, filed a complaint in the court of the Cantonment Magistrate, Cawnpore. G. L. applied to the High Court to quash the proceedings on the ground that the court at Cawnpore had no jurisdiction. *Held*, that as the loss to the complainant had accrued to her at Cawnpore and as loss entailed by criminal breach of trust is a consequence, that completes the offence, the court at Cawnpore had jurisdiction to try the case.

GEORGE LANGRIDGE v. GRACE ATKINS. 431

—————Criminal misappropriation—Principal firm at Cawnpore—Branch at Gauriganj—offence committed at Gauri Gunj.

See Code of Criminal Procedure 1898, Sec. 79. 45

—————Small Cause Court—Arrears of maintenance.

A suit for a sum of money by way of damages, as arrears of maintenance under the terms of an agreement, falls within the description of a suit for maintenance and is not cognizable by a Court of Small Causes.

MUHAMMAD HASAN v. NOOR JAHAN. 158

Judicial Officers Protection Act (XVIII of 1850.)

A Magistrate in directing a general search in view of an inquiry under the Code of Criminal Procedure is acting in the discharge of his judicial functions, and in an action against him for trespass in respect of the search so made, he may, if necessary, appeal for protection to the Act for the Protection of Judicial Officers (Act XVIII of 1850).

LOFTUS OTWAY CLARKE v. BROJENDRA KISHORE ROY CHOWDHURY. P. C. .. 192

Lambardar and co-sharer—Suit for profits—Pendency of partition proceedings—No bar—Civil Procedure Code—Order 2, Rule 2—Two suits—First for share of plaintiffs' profits—Second for share of other sharer's profit which plaintiff takes by assignment—No bar.

The pendency of a suit for partition is no bar to a suit by a co-sharer for profits against the *lambardar*.

Where two suits are brought against a *lambardar* by a co-sharer, one for her own share of the profits and the other as assignee of another co-sharer, the second suit is not barred by Order 2, Rule 2, of the Code of Civil Procedure.

Lambardar and co-sharer—(concluded.)

There is no provision of law regulating what interest ought to be allowed to a successful plaintiff suing for profits against a *lambardar*. In fixing a rate on which interest ought to be allowed the analogy of what is allowed in favour of a landlord against a defaulting tenant is not an unreasonable one.

MUHAMMAD ABDUL AZIZ v. RAFT-UN-NISSA BIBI. 469

Land Acquisition—Compensation—Mode of apportioning between different interests.

Where there are different interests in a land which has been acquired under Land Acquisition Act, the proper method of apportioning the compensation is to calculate the respective values of the interests and to award the compensation in proportion thereto.

HIRDEY NARAIN v. M. J. POWELL. 403

Land Acquisition Act (I of 1894), sections 53 and 54—Right of appeal to the Privy Council—Effect of a reference under the Act taken by two Judges of the High Court—A right of appeal must be by express enactment.

There is no appeal to the Privy Council as of right from an award of a High Court under the Land Acquisition Act, 1894.

Section 53 of the Land Acquisition Act, 1894, applies to an earlier stage in the proceedings and has nothing to do with an appeal from the High Court, and section 54 only applies to proceedings in the course of an appeal to the High Court and its force is exhausted when the appeal to the High Court is heard.

A right of appeal from any decision of any tribunal must be given by express enactment.

The Sandback Charisty Trustees v. The North-Staffordshire Railway Company, [1877] L. R., 3 Q. B. D, 1, followed. .

A special and limited appeal is given by the Land Acquisition Act from the award of "the Court" to the High Court. No further right of appeal is given, nor can any such right be implied.

THE RANGOON BOTATOUNG COMPANY, LD. v. THE COLLECTOR, RANGOON. P. C. . . 271

Landlord and tenant—Agreement to pay *rasum zamindari*. One *anna* above cash rent—Public Policy.

Where by a *qabulnat* a tenant contracts to pay to the landlord certain *rasum zamindari* in addition to cash rent, held in a suit by the landlord for recovery of the cash value of the articles the tenant had not delivered that the agreement to pay anything over and above the rent was against public policy.

SIR RAM v. ASGHAR ALI 416

Civil and Revenue Courts—Jurisdiction.

The plaintiff sued in the Revenue Court to eject the defendant saying that he was a tenant from year to year. The defendant pleaded that he had bought the property from B, who had his house on the land. The Assistant Collector dismissed the suit observing that the defendant had the first claim to hold the land on payment of rent but that the status of the defendant must be determined by a competent court. The plaintiff accordingly brought the suit in the Civil Court and it was dismissed: *Held*, that the suit was maintainable.

Narain Singh v. Gobind Ram, 8 A. L. J. R., 431, distinguished.

CHAUHARJA SINGH v. SARABJIT 85

Ex-proprietary tenancy—Relinquishment of holding—Whether person relinquishing becomes tenant of all proprietors—Decree for joint possession.

One J. sold his *zamindari* including Sir. He also relinquished his ex-proprietary holding in favour of the predecessors-in-title of the plaintiff. The plaintiff not having obtained possession, brought a suit for exclusive possession of the holding.

Held, that J. became the tenant of all the proprietors and the relinquishment of his ex-proprietary holding enured for the benefit of all the co-sharers, and the plaintiff was not entitled to proprietary rights in the land to the exclusion of the co-sharers.

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Landlord and tenant—concluded.)	
Whether, however, he should get joint possession would depend upon the circumstances, and the mere fact that he never had been in possession was not a sufficient reason for refusing him the relief.	
MUHAMMAD IBRAHIM v. RAMKISHUN RAI	95
— <i>Ex-proprietary tenant—Sale by a co-sharer of his share—Tenant of all co-sharers.</i>	
Where in a village all the co-sharers are proprietors of <i>sir</i> land and one of them sells his zamindari and ceases to be a co-sharer, he becomes the ex-proprietary tenant of his <i>sir</i> land and the tenant of all the co-sharers of the <i>patti</i> including the purchaser of his share.	
DEBI PRASAD v. BHAGWAN DIN P. C.	437
— <i>Grove—Transferability—Wajib-ul-arz—Persons planting with consent of zemindars who are in possession of groves—Maliks.</i>	
Where under the terms of a <i>Wajib-ul-arz</i> persons, who plant with the consent of the zemindars who are in possession of groves, are to have the rights of a <i>malik</i> , they are entitled to sell the groves.	
MUHAMMAD YASIN v. ILAHI BAKHSH	78
—rights of the landlord in respect of house site and grove land.	
See Code of Civil Procedure, 1882 Sec. 584	335
— <i>Stranger building upon land of another—Purchase from a person having no title—Lapse to the zemindar—Whether such person entitled to remove materials of building.</i>	
A tenant owning a house in the village died without heirs and the house lapsed to the <i>zemindar</i> . The defendants purchased it from certain persons who had no title, and then improved it at considerable expense using the old materials, where possible. In a suit by the <i>zemindars</i> to eject the defendants, <i>held</i> that the defendants were not entitled to remove even the materials of the building.	
<i>Narayan v. Bholaagir</i> , 6 Bom., H. C. R., 88, and <i>Premji v. Haji Cassum</i> , L. L. R., 26 Bom., 298, distinguished.	
FAKIR CHAND v. KEWAL RAM	118
Limitation— <i>Application for setting aside sale—Deposit of 5 per cent. extra—Property sold 28th August but deposit not accepted till 28th—Effect of.</i>	
Certain property was put up for sale in execution of a decree on 22nd August, 1911, but the sale officer did not make a declaration as to who was the purchaser but referred to the civil court for some information on receiving which on 28th August he directed the person whose bid was the highest to deposit the usual one-fourth of the price. On September 23 the sale was confirmed <i>ex-parte</i> . The civil courts were closed from September 24 to October 26. The judgment-debtor on October 26th deposited the amount of the decree and 5 per cent. of the purchase money and applied for the sale to be set aside. <i>Held</i> , that the auction sale was not concluded till August 28th and that the judgment-debtor's application for setting aside the sale was not barred by limitation.	
MUNSHI LAL v. RAM NARAJN	475
— <i>Declaration of right—Arising of cause of action—Settlement entry subsequently corrected.</i>	
At the settlement of 1901 the plaintiffs were recorded in the revenue papers as being in possession of a smaller area of land than they actually held. The plaintiffs remained in possession, and in April, 1909, the Collector corrected the entry but his order was set aside by the Commissioner in August, 1909, and thereafter the defendants interfered with the plaintiffs' possession. The latter then sued for declaration of title to the land. <i>Held</i> , that whether or not a cause of action had accrued to the plaintiffs in 1901, the Commissioner's order had given rise to a cause of action to the plaintiffs and their suit having been brought within six years of the date of that order was not barred by limitation.	
SHEOPHER SINGH v. DEONARAIN SINGH	418

Limitation Act (XV of 1859)—Sec. 1 (12)

See Regulation XVII of 1806, Sec. 8 538

—*section 19 Schedule II—articles, 110, 116—Acknowledgment—Entries in account books—Suit for rent—Registered lease.*

Entries in account books relating to rent of land in suit not signed by the party against whom it is claimed or by his authorised agent do not operate as acknowledgment to save limitation.

A suit for rent which accrues due on a registered lease is governed as to limitation by article 110, and not by article 116, of the Second Schedule to the Limitation Act of 1877.

JUGGI LAL v. SRI RAM 1

—(XV of 1877) Sec. 28.

See Regulation (XVII of 1806) Sec. 8 538

—Sch. II. Art 135.

See Regulation XVII of 1806, Sec. 8 538

—Schedule II, Art. 147.

See Regulation XVII of 1856 Sec. 8 522

—(IX of 1908) Sec. 31.

See Regulation XVII of 1806 Sec. 8 538

—*Article 7 and 102—Wet-nurse—Suit by domestic servant.*

Held that a wet-nurse was not a household servant and a suit by her for recovery of her wages was governed by Article 102 of the First Schedule of Indian Limitation Act.

MOHAN LAL v. JUMERAT 395

—Art 135.

See Regulation XVII of 1806, Sec. 8 538

—*articles 133, 142, 144—Execution of decree—Formal possession—Effect as against a person other than the judgment debtor.*

Defendant held three mortgages on a certain property. He brought three successive suits upon them. In execution of his decrees upon two of them he purchased the property himself on February 21, 1898, and obtained formal possession on September 7, 1898, and again, on January 30, 1899. In execution of his third decree the property was purchased by the plaintiff on April 21, 1898. This sale was confirmed on May 30, 1898, and formal possession was delivered to the plaintiff on May 15, 1899. The plaintiff instituted the present suit for possession on June 1, 1910, on the allegation that on May 15, 1899, he had obtained actual possession and was subsequently dispossessed in July, 1899. *Held*, that the suit was governed by either article 133 or article 142 of the first schedule to the Limitation Act and not by article 144; and that in either case it was barred by limitation.

BHOLE SINGH v. BHAGWANT SINGH 18

—*article 152—Appeal to District Judge against revenue court decree—Limitation—Procedure as prescribed by the Civil Procedure Code,*

An appeal against a decree of the revenue court was filed before the District Judge beyond 30 days from the date of the decree, *held* that the appeal to the judge was governed by the procedure prescribed by the Code of Civil Procedure and an appeal to the judge must be filed within a period of 30 days prescribed under article 152 of the Indian Limitation Act.

RAM LAL v. AMAR CHAND 535

Mahomedan law—Pre-emption—Talab-i-ishtikah—Demand made before seller not in possession—Whether sufficient.

In a suit for pre-emption based upon the Mahomedan law the pre emptor made his demand by invocation of witnesses in the presence of the seller who was not in possession of the property, *held* that the demand had not been properly made.

INAYAT KHAN v. MUHAMMAD YUSUF 92

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Sale—Registration.	
See Transfer of Property Act, 1882 Sec. 54	154
<i>Waqf—Dedication of property by a person subsequently found not to be its true owner—No ratification by true owner—Dedication not conveying any rights to the waqf in respect of an indemnity bond concerning the property—Right to sue—Suit brought as waqf not allowed to be treated as one by an heir—Practice.</i>	
Certain property was purchased by A who got an indemnity bond executed, guaranteeing the title of his vendors. A made a <i>waqf</i> of the property after which on a claim made by a third party the property was declared not to be A's vendors and passed out of A's possession. After A's death, A's son as <i>mutawalli</i> sued on the indemnity bond. <i>Held (per GRIFFIN, J.,)</i> that under the Mahomedan law the <i>waqf</i> of property of which the person making it was not the true owner and the dedication not being ratified by the true owner was not valid, and the plaintiff had no right to sue.	
<i>(Per CHAMIER, J.)—That as A. had not mentioned or in way referred to the indemnity bond in the waqfnamah the plaintiff as mutawalli had no right to sue.</i>	
<i>Held further (GRIFFIN and CHAMIER, JJ.)</i> that in the appellate court the plaintiff should not be allowed to convert the suit by him as <i>mutawalli</i> into a suit by him as one of the heirs of A.	
MASIH-UD-DIN v. BALLABH DAS	501
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Master and Workmen Act (XIII of 1859)—Application of—Specific work—Workman already doing work.	
The loans that can be recovered under Act XIII of 1859, are the loans which are advanced by employers to their workmen for doing specific work.	
When the money was advanced not for doing any particular work but for work which the workman was already doing and the work was finished by the time of prosecution, <i>held</i> that the Act did not apply.	
GIGA v. MUHAMMAD AMIN	466
Minor—Guardian ad litem, decrees against—binding upon—Fraud.	
A minor, who is represented in a suit by a duly constituted guardian is as much bound by the decree passed in that suit as if he were of full age, when there was nothing on the record to show that there was any fraud on the part of the guardian.	
CHANDAR SEKHAR TEWARI v. BALAKDHAR DUBE	149
Mortgage—Contribution—Release of part of mortgaged property from mortgage charge—Effect on its liability to contribute.	
While mortgaged property remains in the hands of the mortgagor, the mortgagee may enforce his mortgage against any part of the property, and so long as there are no other persons interested in the property the mortgagee may as between himself and the mortgagor, release any part of the property from the mortgage. But when an estate subject to a mortgage belongs to or subsequently becomes the property of several co-sharers, and one of those persons pays off the debt, he can call upon the other co-sharers to contribute rateably out of their shares to the payment of debt, and when after a mortgage has been made another person purchases or takes in mortgage, part of the property, the prior mortgagee cannot, even with the consent of the mortgagor, release any part of the property from the first mortgage, to the prejudice of that person, that is to say, that notwithstanding the release the part released remains liable to contribute rateably to the payment of the mortgage-debt.	
JUGAL KISHORE SAHU v. KEDAR NATH	211

Mortgage—(continued.)

—*Foreclosure—Bond containing stipulation to pay later advance at time of redemption of earlier mortgage—No property made security in the later bond for further advance.*

The ancestor of the defendants executed two bonds, dated respectively, July 19, 1864, and September 1, 1865, in favour of the ancestors to the plaintiffs. The former was a mortgage by way of conditional sale. The latter bond contained a promise to pay a definite sum with interest by the last day of *Baisakh*, and provided that in the event of default the obligees might recover the money from the obligors personally and their movable and immovable property (none being specified). After making reference to the earlier deed the obligor said, "When we offer to pay the amount on the deed of conditional sale, we will first pay the amount with interest of the present deed of conditional sale.....therefore we have written this bond (*lamassuk*) in order that it may be of use." In a suit for foreclosure in the event of non-payment of the amounts due under the two deeds: *Held*, that the latter bond did not create a mortgage.

BALDEO RAI v. MURLI RAI 120

—*Foreclosure—Limitation.*

See Regulation XVII of 1861, Sec. 8 538

—*Joint Hindu family, mortgage by one member—mortgage voidable.*

See Hindu Law—Alienation—joint family property 112

—*Prior mortgagee not asserting his rights in the suit for sale by the puisne mortgagee—res judicata.*

See Res judicata 149

—*Prior and subsequent mortgages—Decree upon prior mortgage—no bar to suit by puisne incumbrancer*

The mere fact that a prior mortgage is merged into a decree cannot prevent a subsequent incumbrancer from suing to enforce his security inasmuch as the rights of the prior mortgagees are always protected in the decree which they obtain on their mortgage.

RAM CHARAN LAL v. MUHAMMAD RASHID-UD-DIN 184

—*Redemption before expiry of term of mortgage.*

The property in dispute was mortgaged to defendants by way of conditional sale for Rs. 599-15-6 for ten years, but all but Rs. 56-15 0 were left with mortgagees for payment to prior incumbrancers. The mortgagee did not pay up the prior incumbrancers, and the plaintiffs, the vendees from mortgagors, sued for redemption of the mortgage before the expiry of ten years. *Held* that on equitable grounds the defendants not having performed what was a most reasonable part of the contract, the plaintiffs should be allowed to redeem before the expiry of the ten years stipulated for.

CHHATEKU RAI v. BALDEO SHUKUL 330

—*Redemption—Right to redeem qualified—Oudh Law—Oudh Estates Act (I of 1869), section 6—Onus Probandi.*

There is nothing in law to prevent the parties to a mortgage from coming to any arrangement afterwards qualifying the right to redeem, and where the right to redeem is so qualified, a suit for redemption based on the mortgage cannot be maintained.

Where the plaintiffs, who sued in the Province of Oudh for redemption of property mortgaged in 1846, were unable to produce the deed of mortgage and the defendants, the mortgagees, would not produce it on the ground that it was lost

Held, that as the transaction took place ten years before the annexation of Oudh, it came within the purview of the Oudh Estates Act (I of 1869), section 6 which imposed certain restrictions on the right of redemption in respect of properties held by the Taluqdars on mortgage, and the onus was cast on the plaintiffs to show that they had, in view of that section, the right to redeem.

SHANKAR DIN v. GOKUL PRASAD P. C. 344

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Simple mortgage—what awards.	
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Unregistered receipt given acknowledging payment—Whether such receipt admissible in evidence.	

A receipt was given in the following terms : "The bond is returned. No money remains due." The receipt was unregistered. In a suit upon a mortgage the mortgagor produced the receipt alleging payment in full : *Held*, that the receipt, though unregistered, so far as it related to the payment of the entire sum of the money due on the mortgage on the date of the receipt, was admissible in evidence, and the words "no money remains due" did not purport to extinguish the mortgage.

PIARE LAL v. MAKHAN	25
Municipalities Act (I of 1900), section 128 (h)—Rules framed under—Power to frame rules charging fees from petty vendors on patris of road—Rules ultra vires—Place of public resort.	

The intention of the legislature by framing section 128 (h) 1 of the Municipalities Act does not seem to give to the Municipal Board a power to inspect and properly regulate all places of public resort. In interpreting an act like the Municipal Act, which encroaches on the rights of the subjects, the legislature is expected to manifest its intention clearly and beyond reasonable doubt. Where the legislature expressly mentioned all places of public resort but the *patris* of a street was not mentioned, *held* that it was not a place of public resort and entertainment.

Held further, that the Municipal Board has no power to frame rules charging fees for licenses to hawk articles of food on the public street, and the rules so framed and confirmed by local Government were *ultra vires*.

IMAMI v. KING-EMPEROR	426
Powers of Municipal Board to require a person to vacate a shop.	

The Municipal Board has no power to require a person to give up his shop situate on land, not belonging to the Municipality, of which such person is lawfully in possession.

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Penal Code (Act XLV of 1860),—sections 122, 211—Whether sanction necessary—Code of Criminal Procedure (Act V of 1898) Section 195 (1).

H. made a report against several persons including one S, at a police station, charging them with rioting and voluntarily causing hurt. The police made enquiry and sent up several persons for trial but not S. Some of these were convicted by the magistrate, but acquitted by the Sessions Judge. Thereupon S, made a complaint to the magistrate, charging H. with having made a false report in respect to himself to the police. The magistrate took cognisance of the complaint.

Held, that the Magistrate had no power to take cognisance of the complaint by reason of the absence of sanction.

HARDWAR PAL v. KING-EMPEROR	61
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Penal Code (Act XLV of 1860)—(continued).

section 190—Prosecution under—Declaration must be admissible in evidence—Court's authority to receive it.

A declaration, before it can be made the foundation of a prosecution under section 199 of the Indian Penal Code, must be one which is admissible in evidence, and which the court before whom it is filed, is bound or authorised by law to receive in evidence. The fact that there is no prohibition against the reception of such declaration in evidence does not render it admissible or make the declarant amenable to the provisions of section 199 of the Indian Penal Code.

RAM PRASAD *v.* KING-EMPEROR 462

section 221—False information to Police.

The offence of laying false information to the police falls under the first paragraph of section 211, Indian Penal Code.

BARKATULLAH *v.* SADHO KALWAR 429

—211.

See sec. 182 61

section 290—Public nuisance—Placing a charpoy temporarily on road.

Held, that placing a charpoy temporarily on the road in a bazar, without any intention of obstructing traffic, does not amount to the offence of causing public nuisance.

KAMLA PRASAD *v.* KING-EMPEROR 862

section 379—Land cultivated by landlord jointly with tenant—Theft—Not a case of.

Where it appeared that a landlord had jointly cultivated land with a non-occupancy tenant and had cut and removed the crops, *held* that the landlord must be deemed to be part owner and in possession and could not be convicted of theft.

PHUL SINGH *v.* KING-EMPEROR 527

—Sec. 406.

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—Sec. 471.

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—Sec. 476.

See Practice—Criminal Cases 473

section 498—Enticing away a married woman—Whether valid marriage may be contracted between a Banya and a woman born of connexion between a Brahman male and a Banya woman—Custom.

Held, that a marriage between a Banya and a woman born of a Brahman father and Banya mother which is recognised by the caste to which her husband belongs is valid, and a person who entices away such a woman is guilty of an offence under section 498 of the Penal Code.

Padam Kumar v. Suraj Kumar, I. L. R., 28 All., 458, and *In the matter of Ram Kumar*, I. L. R., 16 Cal., 264, referred to.

MADAN GOPAL *v.* KING-EMPEROR 82

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See Court of Wards Act 1899 (U. P.) sec. 16 234

Application for leave to withdraw suit with liberty to bring a fresh suit on conclusion of arguments—Not entertainable.

Where there was nothing in the judgment of a lower court granting leave to withdraw a suit with liberty to institute a fresh suit, to show that that court was satisfied that the suit must fail by reason of a formal defect and where there was no other sufficient cause for permitting the suit to be withdrawn, the High Court set aside the order and sent the case back for hearing.

RADHA RAWAN *v.* TULA RAM 398

Practice—(continued).

Assignment of debt by holder of succession certificate—Right of assignee to sue for debt—assignee not allowed time to convert suit as one by holder of succession certificate.

See Succession Certificate Act 1889, sec. 4 506

—Criminal Cases—Cross-examination.

The practice of a Magistrate in inquiries into cases triable by a court of session not to allow any cross-examination before he frames a charge-sheet or till such time that the examination-in-chief of all witnesses for prosecution is over, is contrary to law and must be avoided. A Magistrate has no power to curtail the cross-examination of witnesses except as provided in the Code of Criminal Procedure or the Evidence Act.

The procedure prescribed by Chapter 18 of Criminal Procedure Code, compared with that prescribed by Chapter 21.

DURGA DATT v. KING-EMPEROR 144

Criminal cases—Evidence recorded by Assistant Sessions Judge—Judgment by Sessions Judge—Jurisdiction—Penal Code—(Act XLV of 1860)—Section 467, 471—Alienative charge.

Where an Assistant Sessions Judge heard the evidence but did not pronounce judgment but the Sessions Judge pronounced judgment on the evidence so recorded, *held* that the Sessions Judge had no jurisdiction to do so.

Held further, that an accused can be convicted at the same trial of forging a document and using that document as forged and the charges under sections 467 and 471 of the Indian Penal Code may be regarded as alternative.

Held further, that the intention of the Criminal Procedure Code is that a trial before the Court of Sessions should proceed and be dealt with continuously from its inception to its finish, and that it is inexpedient for a sessions trial to be adjourned except only on the strongest possible ground and for the shortest possible period.

BADRI PRASAD v. KING-EMPEROR 473

Election petition—supplying particulars after petition is presented—Amendment

See Election petition 289

Precedent.

A Magistrate in the Province of Agra should follow the precedent of the Allahabad High Court.

DURGA DATT v. KING-EMPEROR 144

Presumption under Sec. 90 of Act No. I of 1872—Evidence taken prior to presumption.

See Evidence Act, 1872, Sec. 90 87

Reference to arbitration—Award not filed within time—no order superceding arbitration—Procedure, schedule II rule 5 (2).

See Code of Civil Procedure, schedule II rule 5 (2) 23

Suit brought as waqf not allowed to be treated as one by an heir—Right to sue.

See Mahomedan Law—wakf 501

Pre-emption—Custom—Wajib-ul-arz—Loss of right—Joining a co-sharer having an inferior right in the purchase.

In a suit for pre-emption the vendees who were persons having an equal right of pre-emption with the plaintiffs were *held* to have lost their right as against the plaintiffs by associating with them a co-sharer who possessed an inferior right.

Held also upon a discussion of the evidence and with reference to the terms of the *wajib ul-arzes* that the custom existed.

GUPTA SHWAR RAM v. RATTI KRISHNA RAM 70

Pre-emption—(concluded).

Decree ordering payment within a certain time—Payment not made—Appeal whether maintainable.

In a suit for pre-emption the decree for possession was made conditional upon the plaintiff paying the purchase-money into court within one month. The plaintiff appealed against the condition laid down by the first court. The month expired during the pendency of the appeal and the money was not deposited. The appellate court dismissed the suit on the ground that the condition had not been fulfilled: *held* that the condition itself having been the subject of appeal, the suit should not have been dismissed on that ground.

KHURSHED-UN-NISSA v. ALIM-UN-NISSA 421

Conditional decree—Deposit in court of the decretal amount excepting costs of the suit—Sufficient compliance.

Where a pre-emptor deposited in court the sum he was required to pay by the decree to the vendee less the costs awarded to him, *held* that he had completely complied with the order of the court.

ALI HUSAIN v. AMIN ULLAH 153

Muhammadian Law.

See Muhammadian Law—Pre-emption.

Presumption—Adverse possession—Tenants in common.

See Adverse possession 59

Evidence Act, 1872, sec. 90—Practice.

See Evidence Act, 1872, Sec. 90 87

See Evidence Act, Sec. 114 373

See Gambling Act of 1897—Sec. 3 355

Joint Hindu Family—managing member acting for minor members.

See Hindu Law—Joint family 217

Priority—Registered and unregistered instruments.

See Registration Act, 1908 Sec. 50 114

Provincial Insolvency Act No. III of 1907—Section 15 (1)—Grounds for dismissing petitions for insolvency.

A person who petitions to be declared insolvent not unfrequently at some stage or another of the proceedings endeavours to keep back a portion of his property or pretends that property which belongs to him does not belong to him. Action of this kind on the part of a debtor or the suspicion or belief that such action is contemplated by a debtor is not a good ground for dismissing a debtor's petition in insolvency. Such cases, are distinguished from the cases in which the petitions are dismissed as having been presented for inequitable or collateral purposes.

Gurwaridhari v. Jai Narain, I. L. R., 32 All., 645.

Kali Kumar Das v. Gopi Krishna Roy, 15 C. W. N., 990, referred to.

MUHAMMAD HUSAIN v. ILAHI BAKSH 188

—section 16, clauses (2) & 34 (1)—Execution of decree against the insolvent—During pendency of insolvent proceedings—Exclusive right of the decree-holder to property attached and to money attached sold before order of adjudication—Right of the decree-holder.

S held a decree against M. Proceedings to have M declared insolvent were pending from February 24, 1911, to February 1, 1912. S had notice of these proceedings. While the insolvency proceedings were going on, S executed the decree and attached M's immoveable property which he put up to sale in January, 1912. He also attached in November, 1911, a sum of money which had been deposited in court to the credit of M. The sale-proceeds were also deposited in court.

Held (1) that S was entitled to get the sale-proceeds which were assets realised in the course of execution within the meaning of section 34 of the Provincial Insolvency Act and were not the property of the judgment-debtor which

Provincial Insolvency Act No. III of 1907—concluded.

could vest in the receiver ; (2) that the money attached in November, 1911, remained the property of the insolvent, and S was not entitled to get it in preference to the receiver.

SRI CHAND v. MURARI LAL 252

Public Gambling Act No. III of 1867—*Power to issue search warrant—'Office' invested with the full powers of a Magistrate.*

The expression "the Magistrate of a district or other officer invested with the full powers of a Magistrate" used in section 5 of the Public Gambling Act of 1867, means a Magistrate of the first class. The appointment of a Magistrate of the first class as sub-divisional officer gives the officer in question certain additional powers in that particular area, but does not deprive him of all his powers as a Magistrate.

Hence, a search-warrant issued by such an officer for the search of a house outside the *tahsil* of which he was sub-divisional officer, was not illegal.

ABBU SINGH v. KING-EMPEROR 169

—sections 3 and 4—*Presumption.*

A warrant issued for the search of 'any house' which the police officer to whom it was issued might consider proper to search was an illegal warrant within the meaning of the Gambling Act, and any search made under it was not such as was contemplated by the Act. The result of the illegal act, however, is that no presumption whatsoever can be drawn in accordance with the Act such as is allowed by the terms thereof to be drawn in the case of a legal search. Evidence can be given to show that the house is a gaming house.

HARGOBIND v. KING-EMPEROR 355

Railways Act (Act IX of 1890), section 75—*Loss of silver goods—Goods not insured—Liability of the Railway Company.*

The plaintiffs consigned some packages from Bombay to Allahabad where they were delivered to them minus one silver bar which was found to have been stolen between Jubbulpore and Allahabad. The contents of the package were not declared and insurance fee was not paid. *Held* that the loss of silver was a loss within the meaning of section 75 of Railways Act, and the plaintiffs not having declared the value and paid the percentage mentioned in the section, could not hold the Company responsible for the loss.

NARAYAN DAS v. THE EAST INDIAN RAILWAY COMPANY 297

Registration Act, III of 1877—Sec. 17—*Receipt for the full amount paid on the mortgage—Registration not compulsory.*

See Mortgage 25

—Sec. 21.

See Hindu Law—Gift by widow—Reversioners 33

—(XVI of 1908), sections 31, 32, 52, and 57—*Presentation by a person who was not an agent of the executant—Registration invalid—Procedure—Invalid presentation not a question of.*

A mortgage deed was presented for registration by the husband of a *parda-nashin* lady, who was admittedly not a duly authorized agent, to the sub-registrar of Tahsil Bareilly. The sub-registrar sent the document to the departmental sub-registrar for its attestation by the executant. The departmental sub-registrar went to the house of the lady and she admitted execution before him. The document was then sent back to the sub-registrar of Tahsil Bareilly who registered it. *Held* that as the husband of the lady had no authority to present the document for registration and as the departmental sub-registrar had no authority to receive the document for registration, there was no valid presentation of the deed, and it had not been validly registered.

KHALIL-UD-DIN AHMAD v. BANNI BIBI F. B. 440

Registration Act, III of 1877—concluded.

—section 32—Presentation by a servant of the mortgagor in the presence of mortgagor—Presentation valid.

Where a mortgage-deed is handed over to the sub-registrar by a person other than the mortgagor in the presence of the mortgagor and at the time of registration the mortgagor is present assenting to the registration of the document with full knowledge of what was being done in the office of the sub registrar, *held* that the presentation is a valid presentation within the meaning of section 32 of the Registration Act.

Natha Mal v. Abdul Wahid Khan, 34 All, 355, followed.

Mujib-un-nissa v. Abdul Rahim, 23 All., 233, distinguished.

Jamba Prasad v. Aftab Ali Khan, 34, All., 331, not followed.

KARTA KISHEN v. HARNARAIN CHAND 510

—Sec. 32.

See Sec. 31 440

—section 50—Priority—Unregistered prior mortgage—Purchase at auction-sale—Sale by the purchaser by means of a registered instrument—Resale by the vendee to the vendor by a registered instrument.

R made an unregistered mortgage by way of conditional sale without possession in favour of *B* in 1896. *G* purchased the mortgaged property in execution of a simple money decree in 1905. In 1910 *G* sold the property to the appellants by means of a registered deed, and the appellants in their turn sold a portion of it back to *G* by a registered deed. *K* brought a suit for foreclosure upon his mortgage: *Held*, that the appellants were entitled to rank in priority over the unregistered mortgage in favour of *R*, inasmuch as they had no notice of it; *held* also that in respect of the resale to him, *G* was entitled to priority over *R*, because he had no notice of the mortgage; and he was bound by it as auction-purchaser as there was no conflict between the mortgagee and his purchaser, and he was not protected by section 50 of the Registration Act.

Makandas Kalidas v. Shankardas, 12 Bom., H. C. R., 241, referred to.

RAM LAL v. BACHCHA SINGH 114

Registration Act (No. I of 1877), section 50—Priority between registered and unregistered deeds—Same property.

R executed an unregistered mortgage deed in favour of *G* on August 21, 1894. *R* executed another unregistered mortgage-deed in favour of *B* in respect of the same property on May 30, 1896. *B* brought a suit for sale on his mortgage and got a decree. In execution of his own decree he purchased the property. His son sold the property to *B. K.*, and the latter's heir sold it to *I. B. K.*'s heir. however, sold the full right of ownership in the property, and the sale-deed in favour of *I* was registered. In a suit for sale on his mortgage by *G*, *held* that *I* had priority over *G*'s unregistered mortgage.

Subhag Chand v. Bhai Chand, [1882] I. L. R., 6 Bom., 193, distinguished.

ISHRI PERSHAD v. GOPI NATH 222

—Sec. 52.

See sec. 31 440

—Sec. 87.

See sec. 31 440

Registration—Sale of mortgagee rights,—Transfer of Property Act, 1882, sec. 8 and 54.

See Transfer of Property Act 1882, sec. 8 167

Regulation XVII of 1806, section 8—Limitation Act, 1908—Section 31, article 135—Suit for foreclosure—No application made under the Regulation—Barred by Limitation on expiry of 12 years from the due date—Limitation Acts of 1859 and 1871—No limitation for foreclosure—Limitation Act (XV of 1877), section 28, article 135.

A mortgage by conditional sale executed in 1830 provided that the mortgagee was entitled to possession at the end of 1257 Fasil (18th September, 1850) on default of payment of the mortgage debt on the due date. No application for

Regulation XVII of 1806—(concluded.)

foreclosure was made under Regulation XVII of 1806, but a suit for foreclosure was instituted on the 11th July, 1910, *held* that the cause of action arose on the failure to pay the mortgage money on the due date (18th September, 1850), that the mortgagee's right to possession of the property mortgaged was extinguished under section 1, clause (12) of Act XIV of 1859 as soon as twelve years had elapsed from the due date, that the subsequent creation of foreclosure suits could not revive the extinct rights and that the suit was barred by article 135 of the Indian Limitation Act, 1908. *Srinath Das v. Khetter Mohan Singh*, 16 Cal., 698, followed.

RAM DAWAR RAI v. BHIRGU RAI 538

—section 8—*Suit for foreclosure—Barred by limitation if no proceedings taken under the Regulation—Limitation period of—12 years—Limitation Act (XV of 1877), article 147—Transfer of Property Act, no provision for foreclosure before passing of.*

A mortgage by conditional sale made in 1865 provided that the mortgage money should be repaid in 1866. In a suit for foreclosure and for possession of the mortgaged property brought in 1910, *held* that no proceedings having been taken under Regulation XVII of 1806 and the mortgagee's right to make an application for foreclosure having become extinct by reason of efflux of time he could not take possession without obtaining foreclosure in accordance with the provisions of the Regulation and the claim was barred by time.

SHYAM CHANDER SINGH v. BALDAO 522

Res judicata—Minor represented by guardian—Effect of decree against minor.

See Minor—Guardian ad litem 149

—*Mortgage—Prior and subsequent mortgages—Prior mortgages not asserting his rights in the suit for sale by the puisne mortgages.*

A prior mortgagee is precluded from setting up his mortgage or his rights under his decree on the mortgage in a subsequent suit for possession by a puisne mortgagee when the prior mortgagee did not assert his rights in the suit for sale instituted by the puisne mortgagee in which he was impleaded.

CHANDAR SEKHAR TEWARI v. BALAKDHAR DUBE 149

—*Previous application to be declared insolvent dismissed for non-production of evidence—Second application not barred.*

Held, that where a previous application to be declared insolvent was dismissed for non-production of evidence, a second application was not barred by the principle of *res judicata*.

SALIG RAM v. RAM KISHAN DAS 51

—*Previous suit for redemption decreed conditionally—Condition not complied with—Subsequent suit for redemption not barred.*

See Transfer of Property Act sections 60, 92, 93 36

—*Prior and subsequent mortgages—Prior mortgages made party to a suit on subsequent mortgage—Prior mortgage not set up—Parties—Prior mortgagee not a necessary party.*

A prior mortgagee is not a necessary party to a suit wherein a puisne mortgagee seeks to sell the property subject to the prior mortgage. Where, however, the prior mortgagee is impleaded (though as a mortgagor of other properties) in the suit of the puisne incumbrancer, and is aware of the fact that the latter is seeking to sell the property without the burden of the prior mortgage upon it, and omits in that suit to set up his encumbrance, *held*, that a suit on foot of the prior encumbrance is barred by the rule of *res judicata*.

GAJADHAR TELI v. BHAGWANTA 244

See also Code of Civil Procedure, 1908 sec. 11.

Reversioners—Compromise by life tenant of doubtful rights, whether binding upon.

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Where in a suit for possession of a grove as heirs of the last owner, the plaintiffs have definite shares of which they can be given possession, they are entitled to possession of those shares only and not the whole grove. <i>Mannu v. Nasrat ullah</i> , [1901] A. W. N., 36, <i>Hiralal v. Bhawon</i> , 5 All., 662, distinguished.	
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Specific Relief Act (I of 1877), section 23—Specific performance of contract—Circumstances under which performance may be refused.	
Where in a suit for specific performance of a contract the circumstances under which the contract is made are such as to give the plaintiffs an undue advantage over the defendant, though there may be no fraud and where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff, held that the court should exercise its discretion and refuse to grant specific performance of the contract. <i>Shub Lal v. The Collector of Bareilly</i> , 16 All., 423, referred to.	
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Succession Certificate Act (VII of 1889), sections 4 and 16—Assignment of the debt by the holder of succession certificate—Right of the assignee to sue for the debt—Practice—Assignee not allowed time to produce a fresh certificate.	
B. A., who was the mortgagee of the property in suit died leaving behind him F. A. and others as his heirs. F. A. got a succession certificate with regard to the mortgage in suit and assigned the mortgage to the plaintiff, together with his right to sue as a holder of the succession certificate. Held that the plaintiff had no right to maintain the suit as he did not hold a succession certificate.	

Succession Certificate Act (VII of 1889)—(concluded.)

Held, further, that he could not be allowed to convert the suit brought by him as an assignee of the debt into one by a certificate holder by allowing him an opportunity to produce a succession certificate.

ALLAH KHAN v. SANT RAM 506

Succession Act (X of 1865) Sec. 50 (3).

See Transfer of property Act, 1882 Sec. 59 259

Talab-i-istishad—Demand made before seller who was not in possession—whether sufficient.

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Transfer of debt—Succession certificate holder not entitled to transfer his right to collect debt.

See Succession Certificate Act 1889, Sec. 4 506

Transfer of Property Act (IV of 1882), section 3—Immoveable property—Fruit trees—growing timber.

Certain fruit bearing trees were mortgaged along with other immoveable property, *held* that they fall within the definition of immoveable property as defined in the Transfer of Property Act and are liable for sale as such.

KATWARU CHAMAR v. RAM ADHIN UPADHIA 516

sections 8 and 54—Assignment of mortgagee's right by unregistered sale—Whether valid without registration.

A simple mortgage was executed on August 19, 1885. The mortgagees transferred all their rights under the mortgage to the plaintiffs by an unregistered deed of sale dated December 2, 1898. In a suit by the plaintiffs for sale, upon the mortgage on the basis of the assignment; *held*, that the suit was not maintainable.

MUTSADDI LAL v. MUHAMMAD HANIF 167

Sec. 8 and 54—sale of mortgagee rights—Registration.

Section 8 of the Transfer of Property Act cannot be read so as to override the provisions of section 54 of the same Act. The interest of a simple mortgagee is plainly an intangible thing within the meaning of section 54, and the transfer of it can be made only by a registered instrument.

Subramaniam v. Perumal Reddi, I. L. R., 18 Mad., 454 not followed. Observations of BHASHYAM AYYANGAR, J., in *Ramsami Chinan*, I. L. R., 24 Mad., 449, 465, approved.

MUTSADDI LAL v. MUHAMMAD HANIF 167

section 54—Sale—How far affected by Mahomedan law.

Mahomedans have no more right to transfer immoveable property without complying with the provisions of the Transfer of Property Act than any other members of the community, and to allow them to do so would, in effect, be repealing the provisions of the Transfer of Property Act so far as the Mahomedan community are concerned.

GHAFFUR-UDDIN v. HAMID HUSAIN 154

Sec. 54.

See Sec. 8 167

section 54—mortgage Construction—Securing future advances upon mortgaged property—Validity of—section 58. Transfer of Property Act (No. IV of 1882).

There is no law which prevents a party from securing future payments by a charge or mortgage upon immoveable property.

A mortgage deed provided; "He (mortgagee) shall enjoy the profits of the mortgaged lands in lieu of interest. I, the executant, shall continue to pay to the mortgagee every year the deficiency in the amount of interest; and in

Transfer of Property Act (IV of 1882)—(concluded.)

case of default of payment of the same in any year, the *Mahajan* shall in that year have power to recover it from a nine anna *zomindari* share, the proprietary title and other moveable and immoveable property."

Held, that the document must be held to amount to a mortgage in respect of the deficiency in interest on the mortgage money.

BHOLA DAS v. BISHNATH LAL 162

—section 59—"Attested", meaning of—*Mortgage-deed—Attestation of mortgage-deed—Indian Succession Act (X of 1865), section 50 (3)—Attestation on personal acknowledgment by the executant of his signature.*

The word "attested" in section 59 of the Transfer of Property Act (IV of 1882), means the witnessing of the actual execution of the document by the person purporting to execute it.

Held, accordingly that a mortgage-deed is not valid under section 59 of the Transfer of Property Act when the witnesses to the deed were not present at its execution but had put their names on the document on the acknowledgment of the executant.

The provision as to attestation in section 50 (3) of the Indian Succession Act (X of 1865) upon the testator's personal "acknowledgment" is quite a separate condition and in no sense an interpretation of the word "attest."

Shamu Patter v. Abdul Kadir Ravuthan, [1908] I. L. R., 31 Mad., 215, affirmed.

Ranu v. Luxmanrao, [1908] I. L. R., 38 Bom., 44, approved.

Ganga Das v. Shiam Sundar, [1903] I. L. R., 26 All., 69, overruled.

SHAMU PATTTER v. ABDUL KADIR RAVUTHAN ABDUL RAJAK SAHIB P. O. . . 259

—sections 60, 92, 93—*Usufructuary mortgage of occupancy holding—Previous suit for redemption decreed conditionally—Condition not complied with—Subsequent suit for redemption not barred.*

Held, that a person who had before the coming into operation of the Agra Tenancy Act made a usufructuary mortgage of an occupancy holding is not debarred from maintaining a second suit for the redemption of it by reason of a previous suit to recover possession of the same, holding in which the decree was passed, was not complied with.

GANPAT SINGH v. TOHFA 36

—sections 63, 72—*Mortgage—Redemption—Instructions made by the mortgagee—Right to add expenses incurred thereon to amount secured by mortgage—Interest.*

Where a mortgagee in possession has expended money upon making addition to the mortgaged premises, he would be entitled, in a suit for redemption, to be repaid the expenses so incurred if the additions made are 'accessions' within the meaning of section 63 of the Transfer of Property Act, or are necessary for the preservation of the property or are lasting improvements reasonably made for the benefit of the property which are added to the selling value.

Sandon v. Hooper, 6 Beav., 246 : S. C. 49 C. R., 820 ;

Shepard v. Jones, 21 Ch. D., 469, followed.

Held, also, that a mortgagee is entitled, in the absence of any contract to the contrary, to interest on the amount spent by him on repairs for the preservation of the mortgaged premises and also on the rates and cesses paid by him therefor.

RAHMATULLAH BEG v. YUSUF ALI 124

—Sec. 92.

See Sec. 60... 36

—Sec. 93.

See Sec. 60 36

Tort—Malicious prosecution—Suit for damages—First court believing evidence of prosecution—Second court rejecting it—Whether sufficient evidence of reasonable and probable cause.

P. and others lodged a complaint against D. and others charging them with theft and assault which the Magistrate believed, but the appellate criminal court disbelieved. D. and others sued P. and others for damages for malicious prosecution. *Held*, that in such a case the mere fact of one court having believed the complaint is not sufficient evidence of reasonable and probable cause. What has to be seen in cases of this kind is what is the conduct of the complainant before and after making the charge and was the charge false to his knowledge. *Jadubar Singh v. Shoo Saran Singh*, I. L. R., 21 All., 26, distinguished

PADARATH V. DULAM 428

—Vendor and purchaser—Portion of price left with vendee to clear encumbrances—Right of vendor.

Certain property was sold by a private sale. The property was subject to a mortgage and a sum of money was left in the hands of the purchaser for the purpose of redeeming the mortgage, but the amount due on the mortgage was in excess of the amount left in the hands of the purchaser. The mortgagee instituted a suit for sale and in execution sold the property which fetched a smaller sum than was left in the hands of the purchaser. In a suit by the vendors against the purchaser for recovery of the difference between the amount left in the hands of the purchaser and the amount the property fetched at the auction sale, *held* that the plaintiffs after a decree had been passed on the mortgage should have paid into court the difference between the amount due and the amount left in the hands of the purchaser and then have called on the defendant to pay the sum which was in his hands. It was the duty of the vendors to give a clear title to the purchaser subject only to the payment by purchaser of the sum left in his hands. *Mohammad Siddiq Khan v. Mohammad Nasir-ul-lah Khan*, [1899] I. L. R., 21 All., 233 P. C., followed.

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NOTES OF CASES

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High Court, N.=W. Provinces.

1912.

*Partition between father and son—Either liable to pay existing debts—
Mortgage by the father of the son's share to pay off some of those
debts—Suit on that mortgage—Force of decree.*

February, 22

*Sri Narain
v.*

*Raja Dutt
Prasad Singh.*

*F. A. 204 of
1910.*

*RICHARDS, C. J.
BANERJI, J.*

One Chiranji Lal executed a mortgage-deed on 18th September, 1896. Prior to that date there was a partition between him and his son, Sri Narain, under an arbitration award whereby half the mortgaged property became the absolute property of Sri Narain, the latter undertaking the liability of paying half the debt due on that date. In case either of them was to pay more than his share of the debt he was to have a right against the other. It was admitted by Sri Narain that prior to partition the property was the separate property of Chiranji Lal. It was, however, contended on his behalf that the property having become his, on partition, his father had no right to transfer it. It did not appear that either prior or subsequent to the arbitration proceedings, Chiranji Lal ever executed any deed of transfer to Sri Narain; on the contrary it appeared that up to the year 1907, Chiranji Lal remained in possession of the property and Sri Narain had to bring a suit to recover possession. The decree of the lower court provided that if Sri Narain paid off so much of the mortgage debt as ought to be attributed for the debt for which he was liable, his property would not be sold. *Held*:—That the decree was an equitable one.

J. N. Chaudri and Gulzari Lal, for the appellant.

Tej Bahadur Sapru, Madan Mohan Malaviya and Rama Kant Malaviya, for the respondents.

Appeal dismissed.

April, 10.

Chanda
v.
Ram Lal.

F. A. F. O. No.
128 of 1911.

KARAMAT
HUSAIN, J.
TUDBALL, J.

Civil Procedure Code—Order 22, Rule 9—Cause of action—Second suit for redemption not barred in respect of the same property.

Where a suit was brought on a mortgage which abated for want of prosecution and a subsequent suit for redemption was brought relating to the same property, the parties being the same, but the dates as also the amounts secured being different, it was held that the causes of action of the two suits were different, and that although it had been ruled by the High Court in *Sheo Prasad v. Habit Kure* (1 L. R., 18 All., 403) and *Ram Sahai v. Ahmadi Begam* (8 A. L. J. R., 4) that if a plaintiff brought a suit on a mortgage and failed to establish that mortgage, he could not get a decree in that suit for the redemption of another mortgage, there was nothing in either of these two rulings to the effect that a subsequent suit for the redemption of a different mortgage was in any way affected by the result of a previous suit relating to another mortgage.

S. K. Dar, for the appellant.

Gokul Prasad, for the respondent.

A. C. M.

Appeal dismissed.

May, 1.

Ganesh
v.
Kundan.

Civ. Rev.
25 of 1912.

PIGGOTT, J.

Civil Procedure Code, section 115—Revision—Grounds of.

A wrong decision on a question of *res judicata* would not ordinarily be a good ground for interference in revision under section 115 of the Civil Procedure Code.

Sital Prasad Ghose, for the applicant.

Girdhari Lal Agarwala, for the opposite party.

Application rejected.

May, 22.

Parag
v.
Jagannath.

S. A. 1024
of 1911.

BANERJI, J.

Practice—Purchase—Payment of sale money by one vendee—Suit for declaration of right of the other—Dismissal of suit.

Some property was purchased jointly by two persons, one of whom paid the sale consideration. The other brought the suit for declaration of his right to half share. The courts below finding that he had not paid anything dismissed the suit. *Held*, that the view was wrong inasmuch as the non-payment of consideration by the plaintiff would not prevent the ownership of the half vesting in him. 5 A. L. J. R., 96, and 11 All., 244, referred to.

Damodar Das, for the appellant.

Purshottam Das Tandan, for the respondent.

Appeal decreed.

Landlord and tenant—Dwelling house of tenant—No presumption that it is appurtenant to his holding.

Held, that there is no legal presumption that every dwelling house belonging to an agriculturist is appurtenant to his holding ; but that the fact must be established in each case by evidence.

Sundar Lal and Vishnu Ram Mehta, for the appellant.

Govind Prasad, for the respondent.

B. K. M.

Issue remitted.

Mortgage—Occupancy tenure—Subsistence of mortgage after lapse of tenure by death without heirs.

An occupancy tenant mortgaged his grove. He died without heirs and the occupancy tenure came to an end. The zamindar took possession of the grove by forfeiture consequent on the death of the tenant. The mortgagee brought a suit to enforce the mortgage against the grove in the zamindar's hands. *Held*, that the mortgage had not come to an end with the death of the mortgagor without heirs, and that the suit had, therefore, been rightly decreed by the lower court.

Benode Behari, for the appellant.

S. N. Sen (for *Gokul Prasad*), for the respondent.

B. K. M.

Appeal dismissed.

Hindu law—Manager—Father of a minor Hindu co-parcener.

The father of a minor member of a Hindu family is to be presumed to be the manager of the family and sufficiently represents the family in a suit to which he alone is a party.

S. A. Haidar, for the appellant.

A. H. C. Hamilton, for the respondent.

Appeal decreed.

Landlord and tenant—Long user of a plot of land as a threshing-floor—Part of the contract of tenancy.

Where a tenant has for a great number of years used a particular piece of land as a threshing-floor, it is competent for the Court to find, there being no evidence to the contrary, that the right to use the plot of land for the purpose was part of the contract of tenancy. *Dalel v. Bhajju*, 1. L. R., 16 All., 181, followed.

E. A. Howard (for whom *A. C. Mittra*), for the appellant.

Satish Chandra Banerji (for whom *Pearey Lal Banerji*), for the respondent.

B. N. G.

Appeal dismissed.

May, 23.

Moti Ram

v.

Munna Lal.

S. A. No. 1119
of 1911.

BANERJI, J.

May, 30.

Rani Radha
Kuar

v.

Must. Janki.

S. A. No. 1062
of 1911.

KARAMAT
HUSAIN, J.
TUDBALL, J.

June, 4.

S. A. 722
of 1911.

Ram Nares

v.

Sheopal.

CHAMIER, J.

June, 11.

Khazan Singh
v.

Mukh Ram

S. A. 1021
of 1911.

BANERJI, J.

June, 11. Hindu law—Custom in derogation of—Exclusion of daughters—Jats.

Nanhi

Defendant's appeal.

v.

Kheri.

S. A. 237
of 1911.

KARAMAT
HUSAIN, J.
TUDBALL, J

In this case it was proved that there was a strong feeling in the caste that the daughter should not be allowed to inherit, and that during the last 30 or 40 years there were 18 cases in which the daughters were excluded and six cases in which they asserted their right successfully. *Held*, that this evidence was not sufficient to establish a general custom binding on the whole community. There was no evidence to show that this rule of inheritance was uniformly followed over a considerable period of time, so as to be binding on the community as a custom.

E. A. Howard, for the appellant.

Sundar Lal and Girdhari Lal Agniwala, for the respondent

Appeal decreed

June, 13.

Practice—Trial of suit.

Anokhe Lal

v.

Harbans.

S. A. 37 of 1912.

CHAMIER, J.

A question of proprietary title arose in a suit for ejectment brought by an occupancy tenant against his sub-tenant. The Assistant Collector decreed the suit on the strength of an entry in the *Khatani*, and it could be inferred from his judgment that he felt himself bound by that entry and did not take any further evidence. On appeal, the District Judge did not consider the entry to be sufficient proof, or to be binding on him as a Civil Court, and he reversed the judgment of the Court of first instance.

Held, on second appeal, that it could not be said that there had been any real trial of the case, and that a fresh trial was necessary.

Surendra Nath Sen, for the appellant.

A. P. Dube, for the respondent.

S. A. P.

Appeal allowed.

June, 13.

Jurisdiction—Suit for arrears of rent.

Ram Govind
Singh and
another

v.

Mathura
Prasad and
others.

S. A. 35 of
1912.

CHAMIER, J.

Plaintiffs sued defendant No. 1 for ejectment as well as for arrears of rent in a Revenue Court. Both these suits were dismissed. He then brought the present suit in the Civil Court in which he claimed three reliefs :—Declaration of proprietary title, a permanent injunction restraining defendant No. 1 from paying rent in future to defendants Nos. 2 and 3, and arrears of rent previously paid by defendant No. 1 to defendants Nos. 2 and 3.

Held that it could not be contended that the Civil Court had no jurisdiction to entertain the claim for arrears, inasmuch as it was not a claim for arrears of rent from a tenant, but for money received by rival zamindars which was really due to the plaintiffs.

Surendra Nath Sen, for the appellants.

J. N. Mukerji, for the respondents.

S. A. P.

Appeal dismissed.

Acknowledgment by sub-mortgagee—Mortgagee, whether bound by.

Plaintiff, as purchaser of the equity of redemption, brought a suit for redemption to which he did not make the heirs of the mortgagee a party.

Defendants were sub-mortgagees. The court of first instance found that although the mortgage was over 60 years old, as the defendants had acknowledged the mortgage, limitation had been saved. The lower appellate court held that an acknowledgment by the sub-mortgagee is not a valid acknowledgment, and that non-joinder of the mortgagee's heirs was fatal to the suit, as the suit as against them was barred.

In second appeal it was contended that as the sub-mortgagees had acknowledged defendants' title, the claim against them ought to have been allowed. It was urged on the other hand that as the suit against the mortgagee was barred, plaintiff had no cause of action against the defendants-submortgagees, and the acknowledgment was of no avail.

Held, that, the appeal could not be allowed as the mortgagee's heirs, who were necessary parties to the suit, had not been impleaded, and that the acknowledgment did not save limitation, as it could not bind the heirs of the mortgagees.

Ahmad Kareem, for the appellants.

Lachmi Narayan (for *Gavind Prasad*), for the respondent.

Appeal dismissed.

June, 14.

Hafizullah

v.

Noor Khan
and others.

S. A. 1298 of
1911.

PIGGOTT, J.

Mortgage—Redemption—Purchaser of property in execution of a decree.

M made a simple mortgage in favour of *K* in 1874, and a usufructuary mortgage in favour of *B* in 1876. In 1883, *K* brought a suit on his mortgage and obtained a decree in execution of which he bought the property himself. *B* had not been impleaded in this suit. Subsequently *K* died; and the plaintiffs as his heirs brought the present suit for redemption of the usufructuary mortgage against defendants Nos. 1 to 4, the heirs of *B*. Both the courts below gave the plaintiffs a decree.

Held that *K*, by his purchase in 1883, had become owner of the property, subject of course to *B*'s mortgage; and that the ultimate right of redemption must vest in the owners of the property, *i. e.*, the plaintiffs, even though the purchase had been made behind the back of the second mortgagee. I. L. R., 26 All., 464, and I. L. R., 26 Mad., 484 and 527, referred to.

Abdul Raoof (with him *Ibn Ahmad*), for the appellants.

Govind Prasad, for the respondents.

Appeal dismissed.

S. A. P.

June, 19.

Abu Ahmad

v.

Babu Ram.

S. A. 1310 of
1911.

CHAMIER, J.

June, 19.

Jwala Prasad
v.
Hirao.

S. A. 45 of 1912

CHAMIER, J.

Joint Hindu family—Section 9 of Rent Act of 1881—Inheritance.

Held, that section 9 of the Rent Act, 1881, cannot be construed in such a way as to deprive members of a joint Hindu family of their rights in an occupancy holding. There is no question of inheritance in the case of a joint Hindu family.

A. P. Dube, for the appellant.

Govind Prasad, for the respondent.

. G.

Appeal dismissed

THE
ALLAHABAD
LAW JOURNAL.

NOTES OF CASES

Decided by the
PRIVY COUNCIL.

On appeal from
ALL THE HIGH COURTS AND CHIEF COURTS,
And cases decided by
THE HIGH COURT OF JUDICATURE
NORTH-WESTERN PROVINCES.

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THE
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VOL. X. }

ALLAHABAD, JULY 5, 1912.

{ No. 1.

DEVELOPMENT OF LAW IN A PRIMITIVE SOCIETY.

IV.

The present article is probably the last of the series that have appeared in this journal. We have tried to show how the administration of justice is carried on in the earlier stages of society. It must not be forgotten that the administration of justice is anterior to all conceptions of law or legal rules. A rationalistic or any conception of law implies and presumes an advanced stage of society, whereas the settlement of disputes becomes necessary and imperative at the very earliest stages in the formation of society. That justice can be done without any clear conception of the rules of law need not appear very paradoxical to any one. Even now, facts are sometimes placed before a judge which would not fit into any accustomed mould and he goes to the familiar systems of law in search of a precedent. When they fail to afford him one, he goes to that great storehouse of learning—the Roman Law. Whether he places reliance on any of these or whether he takes a perfect *carte blanche* he has the opportunity of giving a free play to his *arbitrium judicis*. As a matter of fact, the facts of no one case are on all fours with those of another and a modern judge is always either expanding or contracting a little, a rule of law or practice. In a primitive society where the rules of law are unknown all depends upon the discretion of the judge. If he is a born judge he does the right thing at the right moment without undergoing the degradation of having to explain his actions by sound and enlightened reasoning.

2 DEVELOPMENT OF LAW IN A PRIMITIVE SOCIETY.—IV.

We have tried to show that in the earlier stages of society the redresser of wrongs or the upholder of right is no less a power than the deity himself. Guilt is ascertained and redress obtained through divine interposition. He condescends thus to interpose not as a benevolent deity but in his sterner aspect as a God of War. He decides the international or rather intertribal affairs in accordance with the result of pitched battles and the private affairs of individuals according to the issue of personal combat. He gathers this strength because the Great Upholder of Right has for the nonce chosen to interpose his strength through him. The issue of the combat which decides the question confers a title on the victor derived from no less a source than God himself, and thus forces its acceptance on the public conscience. The advent of kingship and later on of priesthood opens a way to the peaceful solution of these problems. Taking it *tout ensemble*, the king is the ablest and strongest man of the lot and he is that because the great God has chosen to make him so. He is thus the most chosen instrument of God on earth, and if God proclaims his decree through ordinary men in a personal combat, he should have no hesitation in expressing them through his most acknowledged favourite. The king at this stage holds all the threads of power, he is the focus to which everything good converges. He is not only the temporal but also the religious head; he is the leader on the field and the high priest at home. He extorts implicit faith and acceptance as the *pontifex maximus*, unalloyed admiration and willing obedience as the best fighter and leader. He, therefore, at once puts forth the claim that he, of all men, is commissioned to know the divine will, nay more, it is peculiarly his business and that of nobody else. He can, therefore, decide disputes without any bloodshed, if he condescend so far as to take the trouble of knowing from God, which side is in the right. Litigants, therefore, begin to approach him, but they do so, much in the same way as a perplexed patient approaches a physician. The physician undertakes to ascertain the disease and prescribe the remedy: the patient agrees to accept it without a demur. The king goes into a temporary trance as it were, after the Delphic oracle fashion, during which the spirit of Providence descends upon him, and

at the end of which he is enabled to give the right verdict. This verdict is the verdict of God, and the king is the mere conduit pipe. The message has been delivered at the other end of the telegraphic wire, the king is a mere dummy which mechanically spells it. The award is, as Dr. Carter puts it, "half an invincible prescription and half a divine revelation". These judgments are what have been called "Themistes" or "dooms" of kings, from which Sir Henry Maine traces the origin of all Law.

Here we come to the first rudiments of law, and the debateable point arises 'Where does the law first take its rise?' Sir Henry Maine says it is these "Themistes" or "dooms" of kings or commands of Praetor that contain the germs of all forms in which law has subsequently exhibited itself. His reasoning is that similar circumstances will create similar disputes and a similar decision following upon them. As these decisions multiply a course of conduct comes to be fixed, which after a time hardens into custom. Thus custom is *posterior* to this form of law making. He says: "Parities of circumstance were probably commoner in the simple mechanism of ancient society than they are now, and in the succession of similar cases awards are likely to follow and resemble each other. Here we have the germ or rudiment of a custom, a conception posterior to that of Themistes or judgments. However strongly we, with our modern associations, may be inclined to lay down *a priori* that the notion of a custom must precede judicial sentence, and that a judgment must affirm a custom or punish its breach, it seems quite certain that the historical order of the idea is that in which I have placed them" (1). But Sir Henry Maine forgets that a custom or at any rate complete custom originates, not from the rulers but from among the people; being due to chance or convenience. The authority of the king must *ex necessitate rei* be preceded by the authority of the patriarch, the head of the family. Kingly authority and kingly "Themistes" pre-suppose a developed state of society in which a strong central government of some sort is already formed. Custom must, therefore, be as early as patriarchal commands and earlier than the "Themistes" which

(1) Maine's *Ancient Law*, page 5 (1905 ed).

4 DEVELOPMENT OF LAW IN A PRIMITIVE SOCIETY.—IV.

are judicial decisions rather than commands. The adoption of customary rules of conduct is for the most part unconscious. And in those rough times when every one is practically on the same footing a ready made law *ab externo* cannot harmonise with national feeling.

The German school, accordingly, basing its reasoning on *a priori* methods, says that custom is the first and foremost source of law. Puchta and the great jurist Savigny have, therefore, searched for other explanations to account for the origin of the law. They say that *recht*, or sense of right, is embodied in the consciousness of the people which in its turn is derived from God. The common consciousness of the people expressing itself in spontaneous and uniform action and practice gives rise to customary law which is known by usage. "Custom," they say, "is not the source of *recht* but the last stage by which *recht* externalises itself, that is, the principle is prior to the applications and not as English jurists hold, the principle is a generalisation from its applications" (1). It is hardly conceivable that the king at this stage would venture to force something that was entirely new on the people, although there would nearly always be the gilded covering of divine inspiration to the pill. The king even up to a very late stage in the civilisation of mankind possesses hardly any power over his followers except during the period of actual service. Elevated on their shields as stated before, he owes his office to the voluntary choice of his followers; the foundation of his power rests on the quicksands of the soldier's favour. It was the time when people enjoyed the freedom of the steppe and not of the forum: its cradle was the tent and not the workshop. The days of tyrants were not yet. The consolidation of power which enabled Louis XIV to say *L'etat c'est moi* is impossible at this age. Nor is there in existence that centralisation of power which enabled Henry VIII to confiscate one-third of the property of the landholders in the kingdom and to execute no less than seventy-five thousand persons in a single life-time.

Professor Sloan says the descent of power in the history of mankind has shown a downward course. It vests in the king and then passes to the aristocracy, thence it goes to

(1) Notes by Dr. A. E. W. Hazal (Oxford).

the burgher class, and lastly to the people in general who come to hold the purse-strings. In the primitive ages the title of the king is put to the severest test. If he lacks the administrative and military skill, he lacks it at his peril : he is either overpowered by a noble or vanquished by a foreign foe. But the follies of princes are the opportunities of the people. The incapacity of the king at once leads to the usurpation of his power by his nobles, and the king henceforth becomes a king in council ; he begins to share power with an oligarchy. The *personnel* of the kingly office may change, but the council as a whole is unchanged and unchangeable. It is always existent and always ancient. It, therefore, lays an especial claim to know the ancient customs. It becomes the repository of the knowledge of ancient customs and their chief exponent. Whether the customary law is anterior to Themistes, or whether the binding force of a custom rests on the assent of the people among whom it originates, as Justinian says, or on the fact of its recognition and enforcement by the courts of a state, as some hold, we need not stop to enquire. It is certain, a mass of customs and customary rules do grow up in accordance with which particular disputes have to be decided.

To decide the disputes of others according to one's sweet will is a tremendous power. It is too much of power ; and too much of power is bad for any man ; it is enough to spoil a saint. Hence arises the necessity that rules of law or custom should be widely known and publicly declared, and the judges should be made to conform to them. The reason and ideas of one man may vary a good deal from those of another, and the administration of justice has been protected from the influence of improper motives. " Reason," says Jeremy Taylor, " is such a box of quicksilver that it abides nowhere ; it dwells in no settled mansion ; it is like a dove's neck." Again Locke says, " The legislative or supreme authority cannot assume to itself a power to rule by extemporary, arbitrary decrees, but is bound to dispense justice and to decide the rights of the subject by promulgated, standing laws and known and authorised judges." The public conscience, therefore, at once demands that the existing customs should be reduced to writing and publicly

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exposed. Thus we get the first written body of laws of which *Srutis*, and *Smritis* of the Hindus, the *Al Koran* of the Mahomedans and the Twelve Tables of the Romans are examples. Henceforward everybody assumes that every rule of law and custom necessary for the decision of a case is contained in the Code. The Code, therefore, is the starting point of development in the legal system of almost every country. To this day, England is often quoted as an exception. But even in England, the Code did manifest itself at the very earliest stage. The first one of its kind being the *Dom-boc* or *Liber Judicialis* of Alfred, in which he digested into one uniform Code of laws the local customs of the several provinces of the kingdom which had grown so various. This *Dom-boc* assumed a new shape and obtained a new promulgation in the reign of Edward the Confessor. They embodied ancient customs, but fell into disuse after the Norman Conquest and were lost. And although the development of the Common Law was carried on, mainly by judicial legislation, private Codes in the shape of writings of Glanvill and Bracton and Fleta did make their appearance. After the appearance of the Code the further development of law is carried on by agencies, such as equity, writings of *juris-consults*, and lastly, by legislation. We have to examine what are the instruments and methods by which this is effected. The first topic that comes up for consideration is the use of *fictions*.

In law, as in other matters, reform is not precipitate, but gradual. In the development of law in primitive society lawyers have freely resorted to that peculiar form of legal untruth, viz., the fiction. To adopt the words of Senac de Mailhan the practical sense of lawyers at once tells them that they cannot operate upon the body politic like an anatomist upon a dead subject. They have to consider that they are acting upon living and sensitive beings. They have to regard not only things and principles, but men. They cannot afford to regard men "either as virtuous, in which case they might be persuaded by reason: or as scoundrels, who were to be ruled only by force." Fictions are, therefore, the judicial chloroform that renders the operation of judicial reform painless to the patient. A code of laws professes to contain all the

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necessary rules. The multitudinous and changing affairs of life daily bring up new cases. The set of rules are there, and the judge has to apply them and he must apply them in such a manner that nobody can say that the rule of law has been abrogated.

In the infancy of civilisation one is powerless to control the stream of events; one only attempts to regulate its flow. While everybody almost imagines that things are going well, a true reformer quietly manages that they should go on better. A lawyer, therefore, cannot be blamed if he not only takes but creates the line of least resistance. The means he employs for this are fictions. No man has yet succeeded in laying down the law true for all ages. Lycurgus attempted it, the Vedas attempted it, and a good many others attempted it. With growing needs, the legal rules of to-day are the great impediments of to-morrow; they go so rapidly out of date. The variance between the needs of the society and the legal rules intended to supply them is bound to cause fermentation in the minds of the members of that society, and at last the time comes when the need for change is clearly felt. It is then, that the lawyer takes occasion by the hand and makes the bounds of a legal rule still wider. Let us take examples.

Let us take that tremendous fiction, the fiction of adoption in Hindu Law. A vigorous Aryan nation is impelled by its destiny and set going on a career of conquest. It bursts into the confines of the Indian Peninsula and encamps there as a nation in arms, surrounded on all sides by a sea of enemies ready to swallow it up at the slightest show of weakness. A fighting unit is worth its weight in gold at such times, and the birth of a son is a blessing of God to the community which it is impossible to overrate. Needs of man and the law of God come into line for once and jointly demand the birth of a son, and they do so in order to save men from extermination in this world and damnation in the next. In course of time the troubled night departs and the star of peace returns. Many a peaceful citizen fails to beget a son, and the terrible sanctions, meant to meet the feelings of the hardened warriors, begin to work on his weak and timid nerves. Great fermentation in society is caused, and the need

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for some remedy becomes the crying need of the hour. The rule of religion cannot be changed because it is fixed, immutable and eternal, and it did not demand the birth of a son for a particular age or time. To admit that a rule of Hindu religion could be released or changed, would be to lay the axe at the root of the very tree of religion. If you cannot stop the demand, you must supply it. What could not be had by natural methods was supplied by an artificial one. The fiction of adoption was launched, and in no time we got upon the high sea of fictions. Having opened the door for one fiction a world of them passed through it. The desperate efforts of Hindu lawyers to make the adoptee bear the "reflection of a son" and overcome the hard logic of facts is too well known to need any further elaboration. But the wonder is that the reason of the rule having gone, the rule has not ceased to exist!

Let us take examples from other systems of law :—

In the Roman society the father was the absolute monarch of his household in the earlier periods, and had the power of life and death on those dependent upon him. His sons were under his power whom he could kill or sell as slaves. So great was this power that if a father sold his son as a slave to another and the other set him at liberty, the son would not go entirely free but would again fall into the power of the father. This was a tremendous power. No society can long remain without wishing to see the position of the son improved. The individuality of sons began to assert itself. Public opinion came clearly to demand that things should not remain as they were, and the Praetor, the magistrate, proposed to satisfy the demand. He adopted a clever fiction which not only satisfied the public opinion but strengthened it in his favour. He introduced the fiction of three sales. It was proposed that a certain person should be freed from the power of his father. The father was made to sell the son as a slave. The purchaser of the son manumitted the son and set him free. The son fell into the power of the father. The father sold the son a second time, and the purchaser again freed him. The son again fell into his father's power and he again sold him and the purchaser freed him a third time. Now just see how it works upon the public mind. The

power of the father over the son, his *patria potestas* as it was called, was the creation of *jus civile*, which was the Law of Roman religion. Its operation, therefore, could not be interfered with, and no matter how many sales and manumissions there were, the power of the father could not be lost. But when it is seen in actual practice,—a father selling his son three times in quick succession,—the whole thing becomes a farce.

To thrust a son upon a father who does not want to keep him but wants to sell him as a slave is ridiculous. So, after the third sale the Praetor stepped in and declared the son free, and the power of the father gone for ever. Everybody could, under such circumstances, shut his eyes to the breach of the rule and welcome the decision of the magistrate as being entirely in accord with the sense of the public. So, in many other cases, the Praetor employed his consummate skill.

A. P. DUBE.

NOTES AND CUTTINGS.

It is not always easy to make a true estimate of a judge's work, and the task becomes the more difficult when one has to deal with the career of a judge who has been on the bench only for a few years. Mr. Justice KARAMAT HUSAIN, after having put in an honourable record of work at the bar for 18 years, was elevated to the Bench in January, 1908, in response to the popular demand for a second Indian Judge in the Allahabad Court. He brought with him a great reputation as a specialist in Mahomedan law and a deep and erudite scholar of Arabic. He was universally respected at the bar for his highly polished manners, for his learning, and for his character. During the four years and a half that he has been on the bench, his Lordship has eminently succeeded in giving evidence of his learning, industry, patience and a desire to do justice. If, at times, somewhat technical, his Lordship never shirked any question of law which was presented to him in the course of arguments. Some of his elaborate judgments bear testimony to his love of case-law, and desire to enunciate principles, more particularly, in cases which raised questions of Mahomedan jurisprudence. We are not at all sure that it is always good to be too elaborate nor even that brevity is the soul of good law. Each judge has got his own manner, and we should not like to attach too much importance to his brevity or prolixity in judging of his work. Whether Mr. Justice KARAMAT HUSAIN took the right view or the wrong in any particular case—and even judges of the High Court are by no means infallible—no one who appeared before him could say that his Lordship did not give the most patient hearing to the case, or that he did not, according to his own lights, make an attempt to arrive at a satisfactory conclusion. And there is really not much more which any judge can do. Mr. Justice KARAMAT HUSAIN was not perhaps very expeditious, but if we had to choose between a slow judge and a judge who is always in a hurry, we should not hesitate to make our choice. His relations with

the bar were always marked by a most genuine courtesy. In his retirement, the bench and the bar and the public will lose a judge who has deserved well of them and their best wishes will go with him in his retirement. Mr. Justice KARAMAT HUSAIN has always been known to be a man of studious habits and philosophic tastes, and there is nothing which has appealed to him more than the cause of the education of Indian women, for the advancement of which he has made a most generous benefaction. We have, no doubt, that his retirement will mean a great gain to the cause which he has so near at heart.

The appointment of the Hon. Mr. MUHAMMAD RAFIQUE to the vacancy caused by the retirement of Mr. Justice KARAMAT HUSAIN will take nobody by surprise for he had for sometime been looked upon as the most probable successor of the latter. Mr. RAFIQUE is a graduate of the University of Cambridge (Moral Science Tripos), and is a barrister-at-law of nearly twenty-seven years' standing. He started practice at Aligarh, then moved on to Rae Bareilly and afterwards to Lucknow, where, however, he took up an appointment in the subordinate Judicial Service in Oudh nearly twenty years ago, his best friends thought that he had sacrificed a career at the bar. Official preferment in his case has been rather slow in coming, for it was not until 1909 that he was confirmed as a District and Sessions Judge. But when once it did come, it moved on rapidly. Shortly after his appointment as a Sessions Judge he was promoted to an Additional Judicial Commissionership in Oudh, and now he comes as a judge to our Court. He brings with him a reputation for ability, intelligence and independence. We have every hope that he will be able to maintain the best traditions of this Court. He will be practically new to the bar of this Court, but we have no doubt that his relations with it will be marked by courtesy and consideration. We offer our congratulations to his Lordship, and wish him every success.

THE POLITEST OF JUDGES.

Occasionally there are judges on the bench so polite that their courtesy is vexatious to the recipients. Justice Graham

of England was spoken of as the most polite judge that ever wore the ermine.

"My honest friend," he would say to some convicted criminal, "you are found guilty of a felony, for which it is my painful duty to sentence you to transportation for the term of ten years."

On one occasion he, by mistake, sentenced a man to transportation who had been convicted of a crime punishable by death. Having been set right by the clerk of the court, His Lordship gravely exclaimed :—

"Dear me! I beg his pardon, I am sure!" Then putting on the black cap he courteously apologised to the prisoner for his mistake and sentenced him to be hanged by the neck until he was dead.—*The Green Bag.*

A GREAT SPEECH.

An Indiana lawyer, whose eloquence was of the spread-eagle sort, was addressing a jury at great length when his legal opponent growing weary went outside to rest.

"Old Ironsides, is making a great speech" said someone to the bored attorney. "Old Ironsides, always makes a great speech," said the other, "If you or I had occasion to announce that two and two make four, we would be just fools enough to blurt it right out. Not so old Ironsides." He would say, 'If by that particular arithmetical rule known as addition, we desire to arrive at the sum of two integers added to two integers, we should find—and I assert this boldly, sir, and without fear of successful contradiction, we, I repeat, should find by the particular arithmetical formula before mentioned, and sir, I hold myself perfectly responsible for the assertion that I am about to make—that the sum of the two given integers added to the two other integers would be FOUR'.—*The Green Bag.*

A FAMILY AFFAIR.

A well-known lawyer tells of a case on trial in one of those conservative old counties of Pennsylvania, the inhabitants whereof live pretty much as their fathers did and are seldom moved by any desire to emigrate.

Now, eleven jury jurors had been obtained, and a talesman was undergoing examination touching his fitness for the twelfth jurorship, when counsel for the prosecution suddenly interposed with:—

"Oh, by the way, Mr. Allen, I notice that you have the same name as the defendant in this case. Are you related to him?"

"Distantly, sir," answered the talesman.

"In that case, your honor," said the lawyer, addressing the court, "I shall challenge him for cause."

"He can step down if you wish, Mr. Perkins," said the Judge, "but I do not think it will make any difference. The eleven jurymen you have secured are all distant relatives of the defendant."—*The Green Bag.*

A DEFINITION.

An amusing illustration of giving a definition that itself needed to be defined—a frequent occurrence, by the way, is instanced in the case of a southern witness and a lawyer.

Some matter of boundary was in question, and a certain witness, animated with a laudable desire to make things smooth, turned to the judge with the confidential remark:—

"You see, your honor, that there house a lways was cattawampus."

"What did the witness say?" asked the learned judge, not quite certain that he had heard aright.

Whereupon a smart young lawyer jumped up and explained with a patronizing air, half for the judge who couldn't understand plain England, half for the ignorant witness who couldn't choose more elegant language:—

"Your honor, the witness said cattawampus, but what he meant to signify was that the house was built snatchwise."
—*The Green Bag.*

EXCUSES IN COURT.

Shakespeare's lines:—

And oftentimes, excusing of a fault
Doth make the fault the worse by the excuse,

are exemplified in a story told of Lord Eldon, who is said to have been the readiest of barristers in offering neat excuses to the court. Eldon's remarks were frequently of the most imprudent sort.

A young counsel, lacking in self-control, hearing judgment against his client, exclaimed that he was astonished at such a decision. He was ordered by the judges to attend at the bar next morning, to answer for his irregular remark. Lord Eldon, then plain Mr. Scott, undertook to see his friend through the little difficulty. When his name was called, Scott rose and said :—

“ My lord, I am sorry that my young friend has so far forgotten himself as to treat your honorable bench with disrespect. He is extremely penitent, and you will kindly ascribe his unintentional insult to his ignorance. You must see that it originated in that.

“ He said that he was surprised at the decision of your lordships. Now, if he had not been very ignorant of what takes place in this court every day—had he but known you half as long as I have, he would not have been astonished at anything.”—*The Green Bag*.

LIABILITY OF MUNICIPAL CORPORATIONS FOR NEGLIGENCE—Three functions of a municipal corporation can be distinguished: governmental; municipal; and commercial. In exercising the last of these, the municipal corporation is clearly as liable for negligence as a private corporation; in the first, where it is performing its agent duties, which the state has undertaken, such as preservation of the peace, by almost universal authority it is protected from liability as is the sovereign itself. It is in the case of its municipal functions, consisting of activities carried on primarily for the benefit of the inhabitants of that particular city, that the law is yet chaotic. The correct view, it is submitted, is to impose liability.

Negligent injury may result from the use of property or acts of persons. As to property used for municipal functions, the municipality should be held to the same duty of care, as in its private functions. The city has entered into relations which are within the scope of

private law,—control and ownership of property,—and it should be subject to the obligations usually attending such relations. It is true that the property is held for a public purpose ; but in its municipal functions the corporation is not acting as an agent of the government and hence is not clothed with sovereignty. Why should one injured by a defect in a fire-engine house be differently treated from one injured in a municipal power-house? Justice demands a remedy for each ; in each case allowing an action will furnish an incentive to greater efficiency in city administrations ; and though one activity is technically conducted for profit, both are in fact carried on for the benefit of the inhabitants of the municipality.

The second way in which the municipality might be liable is for the torts of its negligent agents. It has been urged, however, that the doctrine of *respondeat superior* should not apply in the exercise of municipal functions, on the ground that this principle of agency is never properly employed except in business dealings, and the analogy of charitable institutions is suggested. While various reasons for the rule of *respondeat superior* have been given, in last analysis the explanation is expediency ; it is socially desirable to hold one who employs and controls another responsible for the torts of that other if in the course of the employment. Profit is immaterial, and the exception of a charitable institution is based on a special ground. Where followed, it has been limited so as to operate only against beneficiaries, it does not apply to religious societies, and the minority decisions refusing to recognize the exception at all are perhaps preferable. The rule of *respondeat superior* would seem, therefore, logically applicable to municipal functions. Its inherent justice is as strong in their case as in that of commercial functions ; and no distinction between the two seems possible on the ground of expediency.

The authorities on this subject are conflicting. Municipal corporations are generally held ' for negligent defects in streets and bridges, but not in new England. *Dyer v. City of Danbury*, 81 Atl. 958 (Conn). The general exemption of quasi-municipal corporations from liability in

respect to highways may be explained on the ground that in their case the duty is purely governmental; the state needs roads, and the county is its agent in caring for them. City streets, however, have peculiar and local uses, primarily for the benefit of the inhabitants of the city rather than of the state as a whole. In other municipal functions the liability of the corporation has not been generally recognized. It is submitted, however, that the cause, thereof is the failure to make the often difficult yet sound distinction between governmental and municipal functions. The law on this question being still unsettled, it may be hoped that this distinction may ultimately be consistently made.—*Harvard Law Review*.

LIABILITY OF MUNICIPAL CORPORATIONS FOR TORTS IN *ultra vires* UNDERTAKINGS.—The rule of *respondeat superior*, in so far as it is affected by the doctrine of *ultra vires*, is more restricted in its application to municipal than to private corporations. As with a private corporation, the mere fact that a city is never authorized to commit a tort does not relieve it of liability for the wrongful acts of its agents; and where such an act is done in the course of an authorized undertaking, a municipal corporation is liable, subject to the doctrine of governmental functions. Nor is it a defence that the conduct of the project is beyond the powers of the particular officers, or that certain formalities were omitted, as long as the project itself is *intra vires* the corporation. If, however, the whole undertaking is *ultra vires*, this bars any action for a tort committed by persons therein employed, and no amount of acquiescence can extinguish the right to maintain this defence. This strict doctrine is illustrated in a recent case. *City of Radford v. Clark*, 73 S. E., 571 (Va). A contrary doctrine has been asserted in several cases where the *ultra vires* act resulted in obstructing the highway. The liability, however, of the municipality might be based on the breach of the city's undoubted duty to maintain its streets in a safe condition, and therefore these cases cannot be regarded as authorities opposed to the universal rule of non-liability for torts committed in an *ultra vires* undertaking.

The underlying principle of this strict doctrine may be more easily ascertained by considering the law as respects

the *ultra vires* contracts of municipal corporations. Here, too, the doctrine is far stricter than that applied to private corporations. The *ultra vires* contracts of a city are generally void and incapable of ratification. Yet, in some few cases, when substantial benefits have occurred to either party, the law gives effect to the *ultra vires* acts of the corporate officers. Where the fact upon which depends the authority to borrow money is not easily ascertainable by the outsider, or the money borrowed has been received into the city treasury and applied to corporate uses, the city is bound by the acts of its officers. And, if a contract has been partly performed, an action for breach thereof may be maintained against the city, notwithstanding the consideration promised was beyond the powers of the city to give. For the same reasons a city cannot escape liability for revenue taxes where it engages in the business of distilling and increases its assets with profits from the *ultra vires* transaction.

Accordingly it seems clear that, within certain limits, a municipal corporation like a private corporation, may have agents for *ultra vires* purposes whose acts may be the foundation of legal rights and liabilities. Hence, the strict doctrine of *ultra vires*, applied to these bodies, must rest on motives of policy, rather than on the lack of any legal principle to identify the corporation with the acts of its agents. That this policy rests on sound considerations, in its general application, seems equally clear. In contracts, the burden should be on the outsider to ascertain the corporate powers, and in other cases the taxpayers should not bear the burdens of the unauthorized acts of their officers. When, however, the *ultra vires* transaction is productive of some benefit, pecuniary or otherwise, which the corporation accepts, and at the same time causes an injury to some innocent individual, the policy of the law might well be altered. The same considerations are applicable by which public corporations are denied the immunity of governmental agencies when an *intra vires* act is of peculiar benefit to the inhabitants; and, moreover, considerations of justice to the injured party might well justify in some cases the imposition of liability upon municipal corporations for torts of their agents committed in *ultra vires* undertakings.—*Harvard Law Review*.

JURISDICTION OVER ABSENTEE, BASED UPON PRESENCE OF HIS DEBTOR.—One claimant of a debt, in suing the debtor, made the other claimant, who was in another state, a party. The absentee's claim was adjudged invalid. This was held to bar his subsequent action against the debtor. *Sletzer v. Chicago M. and S. T. P. Ry. Co.*, 134 N. W., 573 (Ia). The desirability of such jurisdiction depends upon its fairness to the three parties involved. Justice to the plaintiff does not require it. A method, fairer to the other parties, of relieving the plaintiff when the defendant avoids suit by evading him, is to let the plaintiff collect the credit on securing the debtor against liability to the absentee. To the absentee such jurisdiction is unjust in compelling him to come, or to litigate, from afar. This objection is only partly neutralized by the otherwise equal hardship on the plaintiff; the moving, rather than the defending, party in the suit should bear such a burden. Still greater injustice to the absentee lies in the danger that the grossest frauds may be practised upon him if he have no actual and seasonable notice of the suit; but such notice could be made essential for this class of jurisdiction. To the debtor there would be injustice only in the rare cases in which other countries, denying such jurisdiction, should compel the debtor to pay the former absentee claimant. A favourable supreme court decision would prevent this within the United States; and even in the comparatively infrequent cases likely to arise in other common-law countries, it is not clear that they would deny the debtor the defense of the former judgment; in England, for example, the point has not yet been presented for decision.

Analogy constitutes the only justification of the proposed type of jurisdiction. It is no more objectionable on principle than jurisdiction based on the domicile, or allegiance, of the defendant, or on the attachment of his local tangible property or garnishment of his debtors. In all these the absentee is equally as much as in the suggested type of jurisdiction required to come, or to litigate, from afar; and in none, with the possible exception of attachment proceedings, is the absentee any more likely to know of the suit. Even if the *dicta* in some garnishment cases, that the garnishee, to protect himself, must notify his creditor, should become law

the same could apply equally to suits such as in the principal case. Furthermore, none of these other types give the plaintiff a just relief which is not obtainable with more fairness to the defendant. Only in attachment and garnishment is such relief afforded; the plaintiff could be fully protected by permitting attachment or garnishment merely to maintain the *status quo*, pending suit in a state more properly having jurisdiction over the defendant. A distinction between the new class of jurisdiction and all other except that based on garnishment of the absentee's creditors, is that only garnishment and the proposed type present the possibility of injustice, in rare cases, to the debtor; but this is a rather minute consideration.

The proposed type of jurisdiction is helped not only by the fact that many other types are no more justifiable, but also by its close analogy to jurisdiction based on garnishment. Each of these two types includes a suit against a debtor within the state and a suit against an absentee; the difference is merely that the proposed type seeks to disestablish the absentee's right to the principal debt, and garnishment to establish the absentee's indebtedness to the plaintiff.—*Harvard Law Review*.

LAW LIBRARY.

RIVAZ ON LIMITATION. Sixth edition, by H. G. Pearson, Barrister-at-Law and B. K. Acharyya, B.A., LL.B., Barrister-at-Law. Calcutta: Thacker, Spink & Co., 1912. Pp. lix, 488. Price Rs. 13.

Rivaz on Limitation was a classic which the profession would not willingly let die. It was a store-house of information. The editors of the sixth edition of this work deserve the best thanks of all who have the interests of the profession at heart, and it is needless to say that their needs have been well catered for. The original scheme is adhered to, but in order to promote the convenience of reference the number of paragraph-headings has been largely increased, new marginal page-headings have been introduced, and the cases have been

removed from the body of the text into footnotes on each page, and the cases from reports, authorised and otherwise, have been noted to the end of 1911. In our examination of the text we, however, came across a curious misprint. On pp. 45 and 46 we noticed "Darby and Bosanquet," printed as "Darby v. Bosanquet." Reliance has been placed upon

Mathuradas v. Vandrawandas, [1906] I. L. R., 31 Bom, 222,

as ruling that section 10 does not apply, where by reason of failure of some of the trusts a resulting trust arises in favour of the author. The observation of BATCHELOR, J., is *obiter*, and recently BEAMAN, J., has held that section 10 would apply to such a case.

Cassamally v. Sir Currimbhoy Ebrahim, [1911] I. L. R., 36 Bom., 214).

The question is certainly an important one, and the decision of the appellate court will be awaited with interest.

The book is neatly got up. Thicker and better types have been employed, and that accounts for the bulk of the book. The price is moderate, everything considered.

A HANDBOOK OF CRIMINAL CASES. Compiled by Manibhai Vasanji Desai, B.A., LL.B., and Kishorbhai Ajubhai Patel, B.A., LL.B., Baroda: Laksami Vilas Press, 1912. Pp. 965, 116.

A publication like this carries its own recommendation with itself. But these publications have become numerous, and whether there is scope for competition is a question which the compilers should be left to judge for themselves. The present publication is very clearly printed. The pages of the original reports have been preserved in square brackets. The reports dealt with are from 1907 to 1911.

JONE'S BOOK OF PRACTICAL FORMS for use in Solicitors' offices. Vol. I, with Dissertations, Notes and References. By Charles Jones. Third Edition, Revised and Enlarged. London: Effingham Wilson, 1912. 5 net. Pp. xii, 509.

The book under review is not of much use at Allahabad. But it is a useful publication. The Index is full and complete. We recommend it to those who are interested in Solicitors' work.

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THE PSYCHO-PATHOLOGICAL CONFLICT
ABOUT INSANITY.

The flood-gates have been thrust open and a huge torrent of controversy let loose upon medico-legal questions. Of all questions the question of Insanity has been one where Law and Physic in their contests have come to very close quarters. The battle has raged furiously within the indefinable limits of the *terra debatable*. The dispute has been in the demarcation of the frontier line which should divide the respective regions of absolute supremacy. Would a particular unfortunate individual who has been the agent of a certain misconduct come under the pale of Law and abide by its sanctions ; or would he be deemed to fall within the sphere of influence of Physic and allowed to escape with impunity ? A person who is suffering from such a disease of the mind as not to be aware of what he is doing, would certainly not be held responsible under any intelligible theory of criminal punishment. Nor would any specialist of psycho-pathology advocate immunity for every one who exhibits symptoms of odd eccentricity. It is the abnormal medium that furnishes room for disagreement. The situation has been made worse by an unreasonable reluctance evinced by either party to commit itself to any well-defined position. The fear, perhaps, is that precision would entail curtailment and limitation of the principle each stands for. Vague dogmas and guarded generalities alone can leave scope for expansion. Under such circumstances of half-deliberate ambiguity it is no wonder that hopeless uncertainty and confusion

prevail in the matter of the assignment of offenders to their natural spheres of allotment.

The controversy has indeed been of a very long standing and been consistently pursued with great vigour by the parties concerned. All the same, there is much that remains to be said against both sides. The Law of the land is so insufficiently expressed as hardly to enunciate what it means to cover or even vaguely to convey what it aims at. Similarly, the medical knowledge is so hopelessly inadequate and fragmentary as entirely to fail to define what insanity is, or make sure what it means to define. In spite of the tremendous advance made by the science of medicine in the glorious nineteenth century and after, it is still as regards its discoveries about insanity in its pristine growth and infancy. This branch of medical science has hardly yet emerged from its primitive stage of classification and terminology.

An anxious student who innocently takes up a book on medical jurisprudence, or for the matter of that, even on insanity, gets nothing more for his pains than a blurred and confused idea of different kinds of insanity and the particular classical names with which they have been christened. Nothing like even a tolerable approach to perfection has yet been made, and a systematic diagnosis of the disease on scientific lines is the goal to be striven for but yet unattained. Imperfection may, therefore, be deemed some excuse for want of precision. On the other hand, the Law of the land bearing on the point, has grown a bit out of date and antiquated. The definition of insanity, as now given effect to by the judiciary, was laid down as early as 1843. Since then, the medical science has advanced by leaps and bounds, but the Law has not been keeping pace with it. The conception of insanity as then realized was in perfect accord with the stage of medical knowledge reached at the time. But medical science has progressed onward and Law has been left behind. That successive judicial interpretations should adopt the stereotyped method of closely following in the footsteps of precedents is not a matter to be amazed at. That is the natural outcome of the necessary conservatism of Law. The wonder is that the legislature has not stepped in to help the Law in getting out of the difficulty.

Generally speaking, insanity results when the brain and the nervous system are in such a condition that the mental functions of feeling, knowing, emotion, and will, are performed in an abnormal manner. Insanity, accordingly, is another name for abnormality, *i. e.*, a deviation from the ordinary way. If, however, we arbitrarily fix up a uniform standard of normality, strict conformity to which should be deemed the sole test of sanity, it would lead us to the perplexing paradox that every man has a bit of insanity in him. For almost every individual is bound to differ, howsoever slightly, from this arbitrarily fixed standard, and the slightest deviation from it would relegate him to the class insane. Misled by the underlying fallacy, some of the medical authorities have even gone so far as to maintain that genius, too, is a form of insanity. From the practical point of view, however, it is clear that the question is not of absolute but of comparative insanity. Irregularities manifest themselves in varying shades and degrees. An ideally perfect machine is impossible to find; there is bound to be a defect lurking somewhere. But insanity is that getting out of gear of the complex mental machinery that impedes, retards or alters its natural smooth working. The medical conception of this mental anomaly is that the intellect is deeply affected, resulting in an increased rapidity and quantity of thought. The rapid succession of isolated ideas in the brain assumes a fragmentary character; incoherence comes to be the consequence of the precipitation of thought. Often a morbid state of feeling subsides and is superseded by some permanent incurable delusions which are not mere errors of judgment liable to correction, but proceed from a profound disturbance of all the mental powers and processes. The state of the patient's mind is reduced to a condition when life becomes a sort of a permanent nightmare; and the patient himself lives and moves in an imaginary world, and feels himself as if in a waking dream.

We know, however, that a man whom the medical science pronounces insane, does not of a necessity take leave of all his emotions and feelings as soon as he becomes "insane." Motives of hope and fear still continue to exercise their benign influence over him, though to a lesser degree.

Experience shows us that the average lunatic often submits to the threat of immediate punishment held out to him. The cracking of a big dog-whip, for instance, has been found to make lunatics in an asylum "behave admirably."⁽¹⁾ Every one would be able to remember familiar instances of men, commonly regarded as insane, who would not venture to do mischief if they see powerful men keeping watch over them and ready to punish them. "There are mad men who would not have yielded to their insanity, if a policeman had been at their elbow" (per BRAMWELL, B.). In view of these apparent difficulties the Law has been very much averse to accepting *en masse* all the theories and hypotheses of medical science. Formerly the attitude of the Law used to be much too rigid and severe, but happily from the beginning of the nineteenth century a comparatively more rational and human view has prevailed (²). The legal conception of insanity in its very principle differs considerably from the medical. Law looks upon it merely as a species of the aberration of intellect and understanding and pays no attention whatsoever to the emotional aspect of the disease. It is obvious that for practical purposes Law must require some definite, precise and infallible test to guide itself by. Mere vague uncertainties of medical jurisprudence won't do. As an accurate measurement of the particular degree of the weakening of the power of self-control had been an impracticability, the only other alternative course was to resort to an invariable intellectual standard.

The most elaborate and authoritative exposition of the Law of insanity is embodied in the Answers of 15 Judges given in June, 1843, to the Questions put to them by the Lords in consequence of the widespread popular alarm provoked by the acquittal of Daniel McNaughten (³). The abstract principles gleaned from these answers may be summarised as follows :—

I.—"Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to the satisfaction of the Jury."

(1) Quoted by Sir James Stephen. : Hist. Cr. L. ii., pp. 182.

(2) See *R. v. Hadfield*, (1800) 72 S. T., 1281. *Bellingham's case*, (1812) 1 Russ. Cr., pp. 10. *R. v. Offord*, (1831) 5 C. and P., 168; also 7 C. and P., 667 and J. C. and P., 525.

(3) Prof. Kenny : *Cases on Criminal Law*.

II.—“ A person, who labours under partial delusions only (*i. e.* in respect of one or more particular subjects or persons) and “ is not in other respects insane,” “ must be considered in the same position, as to responsibility, as if the facts with respect to which the delusions exist were real.”

III.—“ To establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the accused was labouring under such a disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong.”

IV.—“ A medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and examination of all the witnesses cannot in strictness be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any, and what delusion at the time.”

The first rule merely enunciates the general principle of law that every man is presumed to intend the natural consequences of his act.

The second rule is confessedly restricted within very narrow limits, *viz.*, of partial delusions only. This restriction would, according to the medical opinion, appear to nullify the answer. For it doubts whether there can ever be a person who labours under a partial delusion only, and is not in other respects insane. “ The intellect of a person affected with delusion is like a plot of ground into which a brick of mushroom spawn has been inserted. We can never tell how far and in what direction the mycelium has spread, nor in what quarter it will next evince its presence by a fungous growth.” (1) The contention seems to be, that if such an imaginary person could possibly exist, he would be no other than one whose disease consists exclusively in the fact of his being under a mistaken belief that something exists which, as a matter of fact, does not exist. But a careful consideration would

(1) Dr. Mercier : Criminal Responsibility, Ch. V.

show that an insane delusion is not necessarily a case of innocent ignorance or mistake. A person suffering from such delusions is not like a sane person who draws logical conclusions from wrong premises. His power of reasoning also is impaired, though its outward effect appears only in the form of one or other fixed delusion, which no amount of most conclusive refutations can cure. An ordinary mistake admits of contradiction and cure; but the distinctive feature of an insane delusion is its incurability. Common experience teaches us that a great majority of the lunatics are those labouring under partial delusions only. And even of those who do not show any permanent, fixed delusion it may safely be said that at times when they are uttering meaningless words and phrases or behaving in an inexplicable way they are labouring under some sort of delusions or other that surge through their brains in rapid succession.

Various adverse criticisms have been levelled at the attempt to draw a universal legal test of insanity out of the general words contained in the third rule. But, more or less, they are all elaborations of the taunting attack that it would be a poor compliment to the intelligence of the learned Judges to say that they answered generally, when the questions put to them were confined to the cases of partial delusions only. But it is submitted that there is sufficient internal evidence to justify us in concluding that this answer is perfectly general and not subject to the qualification "labouring under such partial delusions only, and in other respects insane." That this is so, is shown by the fact that the Judges deliberately omit the above reservation which they seem particularly to take pains to specify wherever they imply it; that they avoid the words "insane delusions" and use the word "insanity" instead, and, lastly, they begin by saying that the juries must be told in all cases, etc.

The fourth rule only emphasizes the point that the fact to be primarily determined is the state of the prisoner's mind at the particular time when he did the act in question. The problem how far a medical expert can by a present examination of the patient tell of his past condition, is highly technical and intricate and should best be reserved for a separate article.

The effect of the above interpretations would no doubt be to make the absence of the knowledge of the nature and quality of the act one is doing, which includes the ignorance that what one is doing is wrong, the sole legal test if not the only legal definition of insanity. It is admitted that such a view would obviously ignore the effect of insanity upon the emotions and the will of its subject and take no cognizance of the fact that a disease of the mind can also enfeeble the power of self-control. But as this new form of emotional insanity now vehemently put forth by the medical science was practically unestablished at the time when the learned Judges expounded the law, it is no wonder that they did not take this species of madness into account.

There are a very large number of decisions, both old and new, that prove conclusively that no such form of emotional insanity, whether as a matter of fact it exists or not, is recognized by law. Even the cases following close upon the Answers lay down that "what the jury have to consider is whether the evidence is such as to satisfy them that at the time the act was committed by the prisoner he was incapable of understanding right from wrong, or that he could not appreciate the nature of the act he was committing."⁽¹⁾ "The question was, whether he was incapable of distinguishing right from wrong, or was under the influence of any illusion which rendered his mind at the moment insensible of the nature of the act he was about to commit. If he knew what he was doing and that it was likely to cause death and was contrary to the law of God and man, he is guilty."⁽²⁾ "A mere uncontrollable impulse of the mind, co-existing with the full possession of reasoning powers will not warrant an acquittal on the ground of insanity," (PARKE, B.)⁽³⁾ "The rule laid down by the Judges in *McNaughten's* case is quite inconsistent with such a view [*i. e.*, admitting homicidal mania and moral insanity as good defences] for it was that 'a man was responsible for his actions if he knew the

(1) *R. v. Layton*, (1849) 4 Cox, C. C., 149.

(2) *R. v. Townley*, (1863) 3 F. & F., 839. See also *R. v. Davies*, 1 F. & F., 69; *R. v. Richards*, 1 F. & F., 87; *R. v. Law*, 2 F. & F., 836; *R. v. Leigh*, 4 F. & F., 915.

(3) *R. v. Barton*, (1848) 3 Cox, C. & C., 275. See also *R. v. Michael Stokes*, 3 C. & K., 185.

difference between right and wrong.' " (WIGHTMAN, J.)⁽¹⁾ It is significant that the Indian Penal Code, a later codification, borrows almost *verbatim* the legal test of insanity from the Answers of the Judges. "Nothing is an offence which is done by a person who at the time of doing it by reason of unsoundness of mind is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law." (Section 84.) The Indian cases naturally interpret the Code in the light of the English decisions.⁽²⁾

The above cases establish beyond doubt that impulsive insanity is unknown to Law.

The medical science with equal force insists that the existence of one particular delusion though outwardly bearing no connection with the act committed may yet be evidence of a deep-seated disease affecting a man's whole view of the world in which he lives and moves, falsifying his senses, rendering him inaccessible to reasoning of the simplest kind and incapacitating him from performing the commonest and most conclusive experiments to test his delusions. This contention is expressed in a beautiful simile by Dr. Mercier who says, "As an island is the summit of a mountain, so delusion is but a conspicuous part of a mental disorder, extending, it may be, to the very foundations of the mind, but the greater portion of which is not apparent without careful sounding. The connection between the act and the delusion may be wholly indiscernible as the shallow between two neighbouring islands may be entirely hidden by the intervening sea. But if the hidden springs of conduct were laid bare, the delusion and the act might be found to have a common basis." The influence of insanity upon an individual can conceivably be to interfere with his power of self-control to such an extent as to leave him entirely at the mercy of any temptation to which he may be exposed. For the weaker becomes the power of self-restraint, the greater will be the liability to succumb to the temptation. The question, therefore, arises whether, as a fact, any such thing

(1) R. v. Burton, (1863) 3 F. & F., 772 See also R. v. Haynes, 1 F. & F., 666.

(2) 10 B., 512; 12 M., 459; 23 C., 604; 34 C., 686. (1901) A. W. N., 132; (1905) A. W. N., 2.

as an Irresistible Impulse at all exists. Of course, the mere fact that an impulse was *unresisted* does not imply that it was *irresistible*. The criterion is, whether the accused was devoid of all power of self-control so that he would have committed the act even with "a policeman at his elbow"; in other words, if the impulse was so violent that the offender would not have been prevented even if he knew that the greatest punishment would be instantly inflicted, that nothing but a mechanical restraint could have prevented him.

It is true that medical opinion is not absolutely unanimous on the point. We have Dr. Oppenheimer maintaining with great vehemence that "there is no such thing as an ungovernable impulse." (1) But the great preponderance of medical opinion is in favour of the existence of uncontrollable impulses. A few quotations from recognized authorities would elucidate what the nature of such an impulse is.

"That the will is occasionally under the influence of a disordered impulse which suddenly drives the persons affected to the perpetration of acts of the most revolting kind and to the commission of which he has no motive." (DR. PRITCHARD.) (2)

"Numerous and well authenticated cases have demonstrated the fact that.....there is a third class [of mad men] who are under neither illusions nor moral perversions, if we inquire into the general state of their affections and moral feelings, and who are driven to commit homicide by a sudden and merely blind and instinctive impulse without consciousness of the nature of the act." (M. ESQUIROL) (3).

"The mind is overwhelmed with such a vast and painful emotion, such an unspeakable feeling of anxiety and distress, that the deed of violence is as it were an uncontrollable convulsion of energy giving rise to an undescribable morbid feeling, knowing not what he is doing, he kills some one friend or fancied foe, or perhaps an entire stranger, not really from passion, or revenge or enmity of any kind, but as a discharge

(1) Criminal Responsibility of Lunatics, Ch. X.

(2) Dr. Tweedie : Prac. Med., ii., 118.

(3) Quoted in R. v. Michael Stokes, 3 C. & K., 185.

which he must have of the terrible emotion with which he is possessed." (DR. MAUDSLEY). (1)

"This impulse, thus dominating over all other feelings, leads a person to destroy those to whom he is most fondly attached, or any one who may be involved in his delusion." (DR. TAYLOR). (2)

"In some cases, however, the homicide or attempt at homicide, appears to be the result of an insane propensity or 'impulse,' unaccompanied at least so far as can be ascertained by a delusion." (DRS. LYON and WADDEL). (3)

"Such ideas, desires, impulses are met with in numberless normal people and overcome, but in others—abnormal—the thoughts become so imperative, the feeling of doubt is so insistent, the impulse to do something is so overpowering that the unfortunate patient, instead of controlling them, is controlled by them." (DR. EWENS). (4)

It is obvious now that there is a clear conflict of opinion between Medicine and Law. On the one hand we have the stern dictum of BRAMWELD, B., that "if an influence be so powerful as to be termed irresistible so much the more reason there is, why we should not withdraw any of the safeguards tending to counteract it.....for if the influence itself be held a legal excuse rendering the crime dispunishable, you at once withdraw a most powerful restraint—law, forbidding and punishing its perpetration." (5) On the other hand, we have the earnest importunities of medical advocates pleading that the weakness arises out of helplessness and deserves commiseration.

To conciliate the two irreconcilables a laudable attempt had once been made by Sir James Stephen, which, however, did not bring about the desired result. From the acquittal of Hadfield, Sir James had made a plausible deduction that the test of the knowledge and quality of the act was not meant to be exhaustive. Sir James in his honest anxiety to maintain the glory and dignity of the Law, as befitted an illus-

(1) Quoted by Sir James Stephen : Hist. Cr. L., II., 173.

(2) Med. Jur., II., 564.

(3) Med Jur for India, pp. 324.

(4) Insanity in India.

(5) R. v. Haynes, (1859) 1 F. and F., 666.

trious Judge of the High Court, was naturally reluctant to acknowledge the existing defects in the Law he administered. In face of the strong and decided assertion of medical experts that insanity not only affects men's beliefs but also their emotions and wills, he could not reject the excuse of the loss of the power of self-control. On the other hand, the explicit declarations of the Judges did not allow him to go beyond the knowledge test. To steer clear of this dilemma he was forced to put a new and startling construction upon the word "know." "It is as true that a man who cannot control himself does not know the nature of acts as that a man who does not know the nature of his acts is incapable of self-control." However much we may admire this praiseworthy ingenuity by means of which he attempted to make up for the inadequacy that disfigures the existing law, it would be putting too much strain on our imagination to accept this enlarged meaning. It is humbly submitted that the Answers do not admit of such a wide application as to include that "a man who by reason of mental disease is prevented from controlling his own conduct is not responsible for what he does." Knowledge is an attribute of the intellect alone, and has nothing to do with emotions, will or self-control. Knowledge of the nature and quality of an act is one thing and the power to refrain from doing the act is another; the two faculties are entirely distinct and must not be confused with each other. A man may very well be familiar with the nature and quality of the act of drinking, he may be fully aware of all the ill-consequences of getting drunk, he may even have sense enough to advise a young companion not to drink, still owing to the want of his power of self-control he may not himself be able to resist the temptation. This confusion has arisen mainly out of the fallacious definition of self-control attempted by Sir James. He defines it as "the power of attending to general principles of conduct and distant motives and of comparing them calmly and steadily with immediate motives and with special pleasure or other advantage of particular proposed actions." It is submitted that such a conception of self-control is not quite accurate. Self-control has no connection with the intellectual faculties of attention and comparison. It is rather the power of foregoing

the immediate gratification of a present desire for the sake of greater advantage in the future. A man may very well appreciate "general principles of conduct," he may be able to compare distant motives with immediate ones, yet he may not have self-restraint enough to forbear an immediate desire for the sake of a future benefit. The attempt of Sir James at reconciliation between the two conflicting schools of thought, failed, as it was bound to do. The gulf remains unbridged as before. It will not be an interpretation by the judges, but a direct intervention of the legislature, that will cure the law of its radical insufficiency.

In view of the decided expert medical opinions of great weight and authority, the Law cannot save its face merely by ignoring such opinions. When medical science now positively affirms that there exists a disease of the mind which has the specific effect of destroying or at any rate impairing, to a greater or less degree, the mental faculties which usually go by the name of mental and moral power, although the intellectual powers remain unaffected, there appears to be no justification for the Law to turn a deaf ear to this plea. We must take medical science on its word, so far at least as it keeps itself strictly within its own exclusive zone. It is to be hoped, therefore, that the legislature would end this long standing antagonism between the medical man and the lawyer by mending the law and thereby save eminent medical authorities from being put to humiliation and mistrust while in the witness-box, and protect helpless victims of insane impulses from gratuitous punishment and cruelty.

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CASES AND COMMENTS.

(INDIAN.)

Jurisdiction—Civil and Revenue Courts—Customary dues—Rent

It is a sound doctrine to lay down that Civil Courts have jurisdiction to try all suits unless their cognisance is barred by any express enactment. And we would wish very much that the jurisdiction of the civil courts were extended so as to do away with the anomaly of having two sets of courts, *viz.*, the Civil and the Revenue exercising separate, and to some extent antagonistic, functions. The question is not often easy to answer as to which would be the proper *forum* in a particular case, and the case under review presents the difficulty in an accentuated form. The point arose thus. Some tenants brought a suit in the court of the Subordinate Judge against their *samindars* in order to obtain a declaration that they were not liable to pay certain customary dues which, they alleged, were payable by them as cesses. The dues in question consisted in the payment of a quantity of fruit and wood of trees, a quantity of poppy from a certain class of tenants, a pot of sugar-cane juice and other like things. The *gravamen* of their complaint was that the *samindars* had got these dues entered in the village record-of-rights of the last settlement behind their back. The *samindars* pleaded, *inter alia*, that the suit, as brought, was not cognisable by the civil court. The lower courts held in favour of the *samindars* on the question of jurisdiction and dismissed the suit. The tenants appealed to the High Court and impugned the decision of the subordinate courts. The question being considered of some difficulty it was argued before three judges, and the High Court reversed the decrees of the courts below and remanded the case.

The several judgments, upon analysis, seem to proceed upon three main grounds : (i) that the payment of these dues cannot be enforced *in specie* in a Revenue Court ; (ii) that they are not rent, but something in addition to rent, and,

Sheoambar
and othersv.
The Collector
of Azamgarh
and others.
9 A. L. J. R.,
431.

(iii) that they have no connexion with the land in the occupation of the tenants. We shall deal with each one of these grounds in detail presently, but before doing so we propose to make a few general observations. The contention of the tenants in this case appears to be that they are liable for the rent which they *contracted* to pay at the time they entered upon the lands in suit and for nothing more. It does not appear whether they had written leases in their favour. What they contended was that the *wajib-ul-arz* dues were not part of that rent, and were a sort of illegal exaction by the landlords, and it was upon this ground that they claimed exemption from these demands. Now, according to the zemindars these dues were payable according to custom, and the *wajib-ul-arz* recorded the custom. Unless, therefore, the custom were repugnant to or inconsistent with the terms of the contract for rent, it is, by implication, to be imported into that contract. With regard to a custom like this as between a landlord and a tenant, PARKE, B., has observed as follows in *Hutton v. Warren* (1):—"It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of *presumption that in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages.*" It is also in reference to a similar custom that, Lord MANSFIELD said in his terse language: "it only superadds a right which is consequential to the taking."—See *Wiggelsworth v. Dallison* (2). Following these authorities, we may say that though not expressly contracted to be paid, yet by force of custom which was in this case recorded in the *wajib-ul-arz*, these dues are to be regarded as inseparable from that contract. Section 56 of the Land Revenue Act too, we think, lends support to the view herein formulated in that these

(1) 1 M. and W., 466; S. C. 46 R. R., 368.

(2) 1 Dong., 201; S. C. 1. Sm., L. C., 9th ed., 569, and notes.

dues are described as being *in the nature of rent*. If the remedy for the original contract, that is, for the "ordinary conventional and contractual rent" would have to be sought in the Revenue Court, we think that the same *forum* should have jurisdiction over the remedy in respect of something which is a part of it. It is said that because the landlord will have to institute a suit for damages where a tenant refuses to deliver a pot of sugar-cane juice, therefore the legislature intends that the civil court should have jurisdiction over the suit. But this, we opine, is not the correct test to apply. In a case in which the tenant has refused to pay one of these dues, but has paid the conventional rent, the question to ask is, can the tenant be ejected for his recusancy? Such a suit certainly would lie in the Revenue Court. How would you draw the line of cleavage? Certainly not because these dues are payable in addition to rent? To say, again, that they have no connexion with the land as defined in the Local Tenancy Act is to beg the whole question, for these payments are, as it were, a condition precedent to the tenants being permitted to cultivate their holding. Section 57 of the Land Revenue Act which speaks to the correctness of entries in the record-of-rights by implication supports our contention. We understand that there is an unreported decision of a single Judge in which the view we are advocating has been accepted. This decision appears not to have been noticed by the Full Bench. Already the administration of the Rent Act has been found to be bristling with anomalies and inconsistencies, and the present decision is but adding one more to the *indigesta moles*.

*Hindu widow—Submission to arbitration—Award and decree—
 Reversioners.*

We have no fault to find with the principle of law enunciated in this case by RICHARDS, C.J. Says his lordship: "A decree following an award where the arbitration has been regularly and properly held, and where the case has been properly fought out, ought to be just as efficacious as a decree where there is no submission." The consensus of authority on the point makes it almost an axiom of Hindu law. His lord-

Balakdhar
Dube
v.

Ramanand
Sukla.

9 A L. J. R.,
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ship expressly refrains from deciding the other question as to whether a compromise under the same circumstances would be binding on the reversioners. We are, however, not sure that the view his lordship has taken of the case, is borne out by the facts which shortly are as below:—A certain Hindu died leaving him surviving two widows, one of whom had three daughters, and the other having none. He had also a daughter by a predeceased wife, and she is the mother of the plaintiffs to the present suit. Upon his death these widows entered into possession of all property, movable and immovable, and got the names of the daughters also recorded. Thereupon a cousin of the late owner and a cousin's son brought a suit for a declaration that the family of which they were members (including the late owner) was joint and undivided and for possession of the property. The matter was referred to arbitration, and the submission was signed by all the persons then living who were competent to sign. The plaintiffs' mother was one of the signatories. An award was made in due course according to which out of all the villages claimed, one widow got five villages absolutely, and in the rest they got a life-estate each, the widow who had three daughters, getting three shares and the other one share. A certain disposition of the cash was also made. As for the plaintiffs to that suit the award went on to provide that they would take after the death of the two widows except in regard to a portion of the cash which they were to take immediately. A decree followed upon the award. The present suit was brought by the sons of the daughter of the predeceased wife of the late owner for a declaration that their grandfather was separate from the defendants, and that the submission to arbitration and the award to which they were no parties were fraudulent and not binding on them. The court below found that there was no fraud or collusion in the matter of the submission to arbitration or the award. The question, therefore, arises whether the award can be brushed aside simply on the ground that it favoured one of the widows and ignored the plaintiffs and their mother. The finding of the arbitrator was in unambiguous language that the family and all its dealings were joint. The learned Chief Justice bases his judgment on the ground that the widow who got some of the villages absolutely was the

more influential, that she did not properly fight out the interests of her husband's estate and did not properly represent it. The language is certainly somewhat enigmatical. What the *Shivaganga* case lays down is that the decree should be fairly and properly obtained against the widow who certainly fully represents the estate of her deceased husband while she is in possession of it. There is no pretence for saying that in the present case the defendants practised any fraud. That allegation was clearly negatived by the court below. How does the case of the plaintiffs stand then? It having been found by the arbitrator that the family was undivided, the plaintiffs' mother could not but be ignored. She had been married, and was probably well provided for. It is submitted, therefore, that the ground adopted by the Chief Justice is not tenable. In our opinion the award binds the plaintiffs.

Let us now pass on to the judgment of BANERJI, J. His lordship observes: "It is manifest from the nature of the interest given to the respective parties that what purports to be an award was in reality the result of a compromise between contending parties, and that the award is, in fact a compromise in the guise of a decision of the arbitrator." It seems to us from this observation of the learned Judge that he condemns the award as being a compromise, and as such that it amounted to an alienation. We submit that the award may be placed upon a very different footing. The submission to arbitration was in the nature of a settlement of family disputes. One party was putting forward a claim in the *bona fide* belief that he had a title to the property, and the settlement was arrived at in recognition of an antecedent right. A compromise of this description has been held to be binding upon every reversioner. See, *e. g.*, *Khunni Lal v. Govind Krishna* ⁽¹⁾ and *Madan Lal v. Chuttan Singh* ⁽²⁾. We do not see how in the present case the award can be taken out of that category. The passage relied upon by the learned Judge from Ghose's Hindu Law (2nd edition), p. 267, does not, it seems to us, correctly state the view which that learned author holds, for immediately afterwards he observes: "*But it is difficult to see why a com-*

(1) I. L. R. 33 All, 356, 367. P. C.

(2) 10 A. L. J., 101.

promise or arbitration award fairly arrived at would not bind the reversioner, having regard to the fact that the widow represents the estate fully during her lifetime and is not a mere life-tenant." In the present case it can hardly be said that the award (or "compromise in the guise of a decision by the arbitrator," as it has been termed) had not been fairly arrived at. The lower court itself had nothing to say against it. It in fact, based its decision on certain rulings of the Allahabad High Court which since *Khunnial v. Govind Krishna (upi supra)* are no longer good law. It does not appear whether the decision of the Privy Council was cited, for there is no reference to it in either of the two judgments. It is respectfully submitted that the decision cannot be accepted as a correct exposition of the law.

NOTES AND CUTTINGS.

We are glad to note that the Local Government have appointed Rai Bahadur Pandit Kanhyalal, to officiate as an Additional Judicial Commissioner, in the Oudh Court. We should have been more glad if the appointment was permanent, but it seems as if it is only a temporary arrangement. Of Rai Kanhyalal, we need say no more than that he is an able, and thoroughly upright, Judicial officer with considerable experience and well-versed in case-law. We think that no better man could be selected from the judicial service in these Provinces. Pandit Kanhyalal's rise in the service has been phenomenal, though by no means undeserved. He was only a few years ago a Munsif, he was then appointed an Assistant Judge, and when he got his last preferment, he was officiating as a District Judge in these Provinces. He has given satisfaction wherever he has been posted, and we have no doubt that he will discharge the duties of his new office with ability. We desire to congratulate him upon his promotion.

AN IRISH JURY.

An English jury will listen attentively to the eloquent appeal of counsel, pronounce it "a first-rate speech, one of

the best we ever heard," and bring in a verdict against his client.

A French jury, on the contrary, being far more impressionable, will let an eloquent advocate play upon them as though they were an instrument of twelve strings. Lachand, the great French advocate, used to sway a jury of his countrymen as he would. While defending a prisoner charged with murder, it is said that the jury did not consider whether the prisoner was guilty of murder, but whether this murdered man did not deserve to be killed.

An Irish jury is equally susceptible, and under the spell of a lawyer's eloquence, who knows how to appeal to their feelings, often give a verdict contrary to the evidence.

A Mr. Colclough, having the right to dispose of his property, and being without children, left his landed and other estate, in the county of Wexford, to his wife. The heir-at-law, Lord Rossborough, disputed the will, on the ground of undue influence.

In those days Irishmen had a prejudice in favour of an "ould family," especially when associated with a title. The counsel for his lordship took advantage of this prejudice to make his most telling hit.

Holding up the will by one corner between his thumb and forefinger, he thus appealed to the twelve Irishmen before him, "Tell me, gentlemen, would you disinherit the ould family on a rag of a pocket handkerchief like this?"

The jury brought in a verdict against the widow, who had also excited their indignation by marrying again. She appealed the case, secured a second trial, before a jury in another county, and won her case.—The *Green Bag*.

DAMAGES—MEASURE OF DAMAGES—EFFECT OF NOTICE OF SPECIAL CIRCUMSTANCES AFTER DELIVERY OF GOODS TO CARRIER.—The defendant undertook to carry a printing press by rail to the residence of the plaintiff. Part of it was delivered, and the plaintiff thereupon gave notice of special damages he would suffer if the remainder was not promptly delivered. The plaintiff brought suit for the special damages

alleged to have accrued from delay after the notice was given. *Held*, that such special damages cannot be recovered. *Hasler v. Gulf, C. & S. F. Ry. Co.*, 142 S. W. 629 (Tex., Ct. Civ. App.).

Unless notice of special circumstances be given to the carrier, damages for delay are limited to those which both parties may reasonably be supposed to have contemplated at the time of the making the contract as a probable result of the breach. *Hadley v. Baxendale*, 9 Exch., 341; *Swift River Co. v. Fitchburg R. Co.*, 169 Mass., 326, 47 N. E., 1015. But if such notice be given, the carrier is liable for special damages. *Illinois Central R. Co. v. Byrne*, 205 Ill., 9, 68 N. E. 720; *Gledhill Wall Paper Co. v. Baltimore & Ohio R. Co.*, 119 N. Y., Supp., 623. This rule holds even though the carrier must charge the same rate. *Chicago, etc., Ry. Co. v. Planters' Gin and Oil Co.*, 88 Ark., 77, 113 S. W., 352. If the carrier is notified after the goods have arrived at their destination and delays delivery, he is liable for the loss suffered. *Bourland v. Choctaw, etc., Ry. Co.*, 99 Tex., 407, 90 S. W., 483. Since the carrier is forbidden by law to refuse the goods, impose special rates, or stipulate against liability, the only reason for requiring notice is that he may know of the emergency in time to exercise the higher degree of care which situation demands; and for this purpose notice a reasonable time before the delay has occurred should be as effective as notice at the time of making the contract. But the authorities hold otherwise. *Missouri, etc., Ry. Co. v. Belcher*, 89 Tex., 428, 35 S. W. 6; *Bradely v. Chicago, etc. Ry. Co.*, 94 Wis., 68 N. W., 410.—*Harvard Law Review*.

EVIDENCE—HEARSAY—PROOF OF RACE OF WITNESS'S PARENTS.—The defendant was indicted under a statute for selling liquor to A., a half-breed Indian. A. was allowed to testify that his father was a Portuguese and his mother a full-blooded Indian. *Held*, that this is not error. *State v. Rackich*, 119 Pac., 843 (Wash).

It is well settled that a witness may testify to his own age. *Commonwealth v. Stevenson*, 142 Mass., 466, 8 N. E., 341; *People v. Ratz*, 115 Cal., 131, 46 Pac., 915. While often

such testimony is hearsay, strictly speaking, the courts have held it admissible, probably because the information derived from family talks, birthdays, and other sources amounts practically to knowledge of the fact. *State v. Miller*, 71 Kan., 200, 80 Pac., 51; *Loose v. State*, 120 Wis., 115, or 97, N. W., 526. See 6 HARV. L. REV., 440. Where it is based on personal observation of events and circumstances of daily life, it is not technically hearsay. *State v. Marshall*, 137 Mo., 463, 39 S. W., 63. For the same practical reasons a witness is permitted to testify to the age of members of his family. *Hancock v. Supreme Council Catholic Benevolent Legion*, 69 N. J. L., 308, 55 Atl., 246. *Contra, Rogers v. De Bardebelen Coal & Iron Co.*, 97 Ala., 154, 12 So, 81. It is submitted that the same considerations apply to testimony as to race. It seems a preferable rule to admit it subject to the discretion of the court in determining adequacy of knowledge and means of observation, rather than to exclude it generally on the ground of hearsay. If it is not admissible as a statement of the witness's own knowledge, it could probably be admitted, under proper conditions, as a statement of the family reputation. See 2 WIGMORE, EVIDENCE, §§ 1500, 1502. But *cf. Wright v. Commonwealth*, 72 S. W., 340. And some courts have allowed it to be shown by proof of general reputation in the neighborhood. *Vaughan v. Phebe*. Mart. & Y. (Tenn) 4; *Gilliand v. Board of Education*, 141 N. C., 482. 54, S. E., 413. See 2 WIGMORE, EVIDENCE, § 1605.—*Harvard Law Review*.

Res judicata—MATTERS CONCLUDED—FORMER JUDGMENT BAR TO A NEGATIVE DEFENCE.—In answer to a plea of no consideration in an action for rent, the plaintiff pleaded a recovery on a former instalment. In the former action, there had been no allegation or denial of consideration. *Held* that the defendant is estopped by the former judgment. *Cooke v. Rickman*, 105 L. T., 896 (Eng., K. B. D., July 13, 1911).

In subsequent action between the same parties or their privies, a prior judgment is conclusive evidence as to all questions actually adjudicated thereby. *Price v. Carlton*, 121 Ga., 82. 48 S. E., 721; *Anthanssen v. Dart*, 94 Ga. 543, 20

S. E., 124. This is true even though the later action is on a different cause of action, as for a subsequent instalment. *Koehler v. Holt Mfg. Co.*, 146 Cal., 335, 80 Pac., 73. See *Bond v. Markstrum*, 102 Mich, 11, 19, 60 N. W., 282, 284. The rule is clearly fictitious, since, while declaring the prior judgment conclusive evidence, it confines its operation in this respect to actions between the parties. See 17 HARV. L. REV., 406. The policy underlying it is the desirability of limiting litigation. See 2 BLACK, JUDGMENTS, 2, ed., § 500. It is justified on the ground that the parties have admitted that fact or have had adequate opportunity to contest it. See 2 BLACK JUDGMENTS, 2 ed., § 614. Consequently, it does not apply where the defendant sets up an affirmative defence not considered in the former action. *Richardson v. City of Eureka*, 110 Cal., 441, 42 Pac. 965; *Stone v. St. Louis Stamping Co.*, 155 Mass. 267, 29 N. E., 623. But where the fact, even though not in terms pleaded or denied in the prior suit, was essential to the judgment in that suit it seems properly held *res judicata*. This is especially true if, as suggested in the principal case, the Judicature Act requires no allegation of such essential fact.—*Harvard Law Review*.

LAW LIBRARY.

TRIAL OF WILLIAM PALMER, edited by G. H. Knott. Notable English Trials. Butterworth and Co., Ltd. (India).

The story of Palmer's trial for poisoning one Cook is too well known to be reiterated to our readers. Fitz-James Stephen has characterised it as the most remarkable trial of the century, and this notoriety was due not only to the intrinsic interest of the case itself but also to the galaxy of legal talent arrayed against one another, and the great conflict of medical opinion which was elicited during the course of the trial. In his interesting and informing introductory essay, Mr. Knott has observed that "the trial marked an important step in English criminal trial," consisting in the fact that by means of an act of Parliament the *venue* of the trial was shifted from the Assize Court in Staffordshire to the Central Criminal Court in London in consequence of the

deep-seated prejudice against the accused in Staffordshire. It is said that a story will not bear being told over again, but that is not so with the way in which Mr. Knott has re-told the story. The reader who will plunge into the details after reading the outlines in Mr. Knott's introduction will appreciate the story better. The previous history of Palmer's life also throws a flood of light upon the course of the trial.

We shall not attempt to restate the facts, as this has been done in an admirable way in the Introduction. The Introduction is followed by a calendar consisting of the leading dates in the Trial, and then comes the Trial itself with all its topics of interest. There are two appendices, one of them containing a long letter addressed to the Lord Chief Justice, CAMPBELL, by Palmer's brother, vindicating Palmer's innocence, and the other containing short biographical sketches of the *dramatis personæ*. The standard of excellence attained in the earlier volumes is well kept up in this also, and the illustrations are an added beauty. And to all this is to be added also the general excellence of the get-up.

We heartily recommend the perusal of every one of these books which go to make up the series of Notable Trials as a stepping-stone to the acquisition of the proper equipment of a successful lawyer. For, he will gain by the perusal an insight into the secrets of effective advocacy.

THE LEADING CASES ON HINDU LAW.—PARTS II AND III. ADOPTION contd.—ADOPTION—MARRIAGE. By S. Srinivasa Aiyar, Vakil, High Court, and Manager and Editor, "The Madras Law Journal." The "Guardian Press." Madras. 1912, pp. xi, 231, ix, 343.

The practice in vogue in American schools of law of teaching law through the medium of leading decisions is being largely adopted elsewhere also. The usefulness of the practice is undoubted. In America we have several case-books on the different branches of the law. In England, too, the case-books are coming to the fore. Smith's *Leading Cases*

and White and Tudors *Equity Cases* stand in a class by themselves, and within their domain they have admitted no competitor. In India, too, the orthodox apparatus of imparting legal education stands in need of a root and branch change in order to keep abreast of the times: Already the signs of such change are visible, and to supply the demand, books are coming into the field. Foremost among them is Mr. Aiyar's "Leading cases on Hindu Law" which, (to use the words of Sir FREDERICK POLLOCK), stands in the first rank of our technical books. Three parts are out. The subject of adoption takes up, naturally enough, the first two parts and more than half of the third part. The rest of the third part is devoted to the subject of Marriage. Each of the main topics is divided under several heads, and each head is prefaced with general notes. Then follow the cases dealing with that particular branch. The notes are succinct, well expressed and supported by authorities. The preface to the first part gives pointed expression to the contents of the text, and we take the liberty to quote a portion from it: "The judgments themselves have been analysed and portions of them given appropriate headings with a view to direct the attention of the reader to the particular portions in the judgment which he is really in search of without loss of time". A copious index serves to facilitate the work of reference.

Such in short is Mr. Aiyar's latest publication. It is called the "Leading Cases on Hindu Law", and is but a part of a bigger scheme which, we hope, will fructify in the not distant future. The legal profession already owes an immense debt of gratitude to Mr. Aiyar for his Annual Digests. His Decennial Digest in two volumes is a monument of industry. He has launched another publication under the name of Current English Cases. The scope is, indeed, a wide one, and the labour it will entail is certainly apt to tax the energies of the most patient dry-as-dust, but Mr. Aiyar's industry shows no signs of abatement. May he live long to attain the realization of his hopes.

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THE LAW OF RESTRAINT OF TRADE.

[We present to our readers an article contributed to the *Columbia Law Review* (reproduced in the *Green Bag* for May) by Mr. Foulkes, on the Law of Restraint of Trade. The subject is one of considerable interest and importance to lawyers in the present-day conditions of society in Europe and America.—ED.]

"Trade consists of buying and selling. The factors involved are the buyer and seller, and the chief elements of a sale are (1) person, (2) place, (3) time, (4) price, (5) thing sold. Freedom of trade exists when each individual is entirely unrestrained in his individual action in buying or selling as to each of the elements mentioned. This freedom depends on the common law principle favouring freedom of contract, which in turn is opposed at times by the principle protecting the rights of the community. Freedom of trade presents an opportunity for the existence of competition. Competition in trade consists in endeavouring to make one or a number of sales or purchases which one or several other parties are also endeavouring to make. Competition, so far as it is successful, is an interference with the trade of the party competed against, who has no standing under the law to complain unless the competition is unfair. Competition among the sellers operates to the advantage of the buyers, and *vice versa*. Competition in either case may be to the disadvantage of the parties competed against and, when carried to excess, exterminates competition and leaves the buyer or seller, as the case may be, without the benefit of any competition at all. Competition, therefore, is beneficial to a certain extent, always more or less injurious to the parties competed against, and when

carried to excess produces the same state of affairs as the absence of competition. A person who has freedom of trade may compete, and restriction on this freedom of trade diminishes, to that extent, his capacity to compete. Competition may, therefore, be the indirect result of freedom of trade. The market is the contract between the buyer and seller, and consists of the transaction between these parties.

"The market is controlled when all or the larger part of the buying and selling is in the hands of one person or a combination. Restraints on trade may operate (1) equally on some one or all of the buyers and sellers, on some one or all of one or the other of them, (3) and as to one or all of any of the elements we have mentioned, and may be voluntary or involuntary, direct or indirect. A direct restraint specifically prohibits an individual from some act of trade or restrains him in the manner of doing some act of trade. An indirect restraint is the restraint imposed on another person by reason of this direct restraint. The various restraints of trade are as follows. (1) Monopoly, which is a state of facts and exists when all the buying or selling of a particular commodity is in the hands of one person or a combination of persons acting as a unit. A monopoly is objectionable as a restraint on trade of (*a*) those who may seek to engage in the same trade but cannot do so with any chance of profit because of the monopoly; (*b*) of the persons buying or selling, as the case may be, from or to the monopoly; and (*c*) when the monopoly has been brought about by a combination or contract it is a restraint on the trade of the parties to the combination or contract. The only real evil of a monopoly is its aspect as a restraint on the trade of those buying or selling to the monopoly. The amount of the buying or selling controlled by one person or a combination may be sufficient to confer all the advantages and bring about all the evils of a monopoly, although no perfect monopoly be in effect achieved. The question is, what size of business is to be treated as a monopoly? This question cannot be answered on the authorities:

"Monopolies are of different origin—those arising by grant from the state, by accident and by nature, seem to be lawful. So, also, where the monopoly arises by the exertions of

an individual, the law cannot interfere without repudiating the principle favouring freedom of individual action and contract. When the monopoly is brought about by associated action or combination, the law is different. Monopoly, therefore, is probably in itself perfectly lawful, and the law only objects to certain methods of bringing it about. Competition, regulations by the state, and the action of public service corporations are also restraints on trade; the latter is peculiarly the subject of legislative regulation. A restraint may be imposed on trade by the performance of a covenant contained in a contract, which performance may be an act either of omission or commission, and may restrain the trade of (1) the covenantor, (2) the covenantee, (3) a third person. Our concern is only with the first, in which case the performance of the covenant may involve (1) total cessation of trade, (2) restriction on the manner of trading generally as to one or more of the elements we have referred to. The first is generally found in contracts relating to (1) a sale usually of a business, (2) dissolution of a partnership, employment of a servant; the second in contracts of (1) formation of a partnership, (2) agreement among competitors, (3) agreements between buyers and sellers. The one eliminates competition, the other modifies it.

"The performance of a covenant in restraint of trade is a direct restraint on the trade of the promisor or promisee, and an indirect restraint on the trade of the several parties whose freedom of trade may be diminished by the performance of the covenant. Covenants in restraint of trade may also be divided into (1) those entered into by an individual, (2) those entered into by a combination, (3) those entered into by several individuals for the formation of a combination or by one person in aid of a combination.

"A covenant not to trade was illegal at common law as against public policy when the restraint imposed by the performance of the covenants was unreasonable. The objections on the score of public policy may be reduced to four heads. These are (1) effect on the covenantor, (2) effect on the covenantee, (3) effect on competitors, (4) effect on persons buying from or selling to the covenantee, and in each case we must consider (1) the case of a covenant to abstain from

trade, (2) the case of a covenant merely to trade in a particular way. The objection that the covenantor was injured by the performance of a covenant to abstain from a particular trade is no longer of any force when occupations may be changed with facility. This objection never did apply to a covenant merely to trade in a particular manner. The performance of the covenant is in each case distinctly advantageous to the covenantee, as he is giving a consideration for it. Competitors are benefited in each case because the performance of the covenant to that extent diminishes competition. The persons buying from or selling to the covenantee are injured by the removal of the customer, thus diminishing their freedom of trade by narrowing the market. They have no ground to complain of such removal unless the covenants are taken by some form of combination, which thereby acquires control of the buying or selling. The law cannot interfere except in the case of a combination without repudiating the principle favouring freedom of individual action. There is little danger under modern conditions of an individual acquiring a monopoly by taking covenants in restraint of trade. The other cases of covenants in restraint of trade are those between buyers and sellers, which, in the case of individuals appear to be unobjectionable.

"When we consider the subject of combination, we must recognize the distinction between individual action and associated action. So far as the law of restraints on trade is concerned, the right of association is regarded as a peculiar privilege, the exercise whereof may lead to results injurious to individuals and to the public, and therefore to be circumscribed and jealously dealt with by the law. The argument that what one man may lawfully do several together may do is not sound, because the law regards the potency of numbers, and the principle as to the lawfulness of an individual act cannot be carried to its logical conclusion because of the counter principle as to the unlawfulness of associated action. The two principles are logically inconsistent, and the most that the law can do is to strike a rough balance between them. A combination in restraint of trade is where two or more individuals conduct their respective buying or selling, as the case may be, with respect to one or more or all of the elements.

we have noticed, according to some common rule which they have voluntarily adopted. A combination may appear in several forms, which are (1) two or more individuals buying or selling separately in pursuance of some contractual obligation existing between them ; (2) a partnership buying or selling ; (3) an association ; (4) a corporation ; (5) a trust. The same principles probably apply to all these forms. In practice, however, the distinction between the cases cannot always be easily drawn, and two or more of them are sometimes involved together.

"A contract is to be distinguished from a combination. The contract precedes the combination, and combination is the result of and grows out of the performance of the contract. The law may condemn the invalidity of a combination in several ways : (1) by refusing to enforce the terms of the combination among the parties to it ; (2) by refusing to recognize the combination as having any validity in a controversy between it or its members and persons not members ; (3) by interfering through the agency of the state or private individuals interested, not parties to the combination, to prohibit the continuance thereof or prevent its coming into existence, which case arises under statute and is excluded from this discussion, and in each case we must distinguish combinations between buyers or sellers and combinations between buyers and sellers. The validity of a combination in each case is to be discussed under the following four headings : (1) as between the members of the combination ; (2) as between the combination and competitors ; (3) as between the combination and persons buying from or selling to it ; (4) as between the combination or members thereof and third persons unconnected with the trade. As to the first, the authorities do not enable us to lay down any principle from which it can be said when a combination is or is not valid as against its members. The most that we can venture is that where the combination obtains control of the market, the law will condemn it by refusing to enforce it among the parties thereto, but no answer can be made to the question of fact, which is, when does a combination have control of the market ?

"In the aspect of a combination as against competitors, there are two branches of the subject,—the combination

competing, the combination eliminating competition. Where the combination competes, the restraint is on the trade of the parties competed against, and their right, if any, sounds in tort. Where the combination eliminates competition, it does so by taking covenants not to trade, which may be annexed to the purchase of a business or taken from parties whose business is not purchased. Although a distinction has been suggested between the two, it is apprehended that there is none, and the invalidity of the covenant in each case depends on the circumstance that the covenantee is a combination and is, by reason of the covenants, acquiring control of the market. Since, however, the covenant is invalid because of the illegality of the covenantee, thereby obtaining control of the market, an innocent covenantor should be permitted to enforce the contract. Although this distinction has been suggested in some cases, it cannot be said to be supported by authority. When the law undertakes to interfere as between the buyer and seller on behalf of or against a combination, it presses more freely on the principle of freedom of contract than in any of the cases heretofore discussed. While in those cases the law merely refuses to enforce a contract already made, in this case the interference may involve the making of a contract for the parties. The principle seems to be striving for recognition that an individual may be assisted by the law in obtaining favourable terms from a powerful combination. This principle has reached its fullest development in the law of public service corporations, and persons engaged in public callings, where the law compels the parties to deal with all persons alike on reasonable terms. In each case, in considering the aspect of the combination as against third parties not connected with the trade, the rule generally is that the combination may enforce any right it may have, irrespective of the circumstance that it is an illegal restraint on trade."

NOTES AND CUTTINGS.

Contracts.—*Liability of Subscribers to Newspapers—Implied Acceptance.*—Kas.

Defendant's father-in-law subscribed for a newspaper for a specified time, to be sent to defendant. After the time of the subscription had expired, plaintiff continued to send the newspaper to the defendant, who directed that it be stopped, but continued to receive it from the post-office. The plaintiff afterward sued for the subscription price.

In *Austin v. Burge*, in the Kansas City Court of Appeals (137 S. W., 618, *N. Y. Law Jour.*, Apr. 19), it was held that a contract to pay for the subscription arose by necessary implication. The Court decided the case in accordance with the rule that one who receives a paper from the publisher without refusing or returning it becomes liable for the subscription price. *Fogg v. Atheneum*, 44 N. H., 115, 82 Am. Dec. 191; *Ward v. Powell*, 3 Har., Del. 379; *Goodland v. LeClair*, 78 Wis., 176, 47 N. W., 268; *Weatherby v. Bonham*, 5 C. & P., 228.

We agree with the *New York Law Journal* that "it would seem that the principle of implied acceptance and obligation to pay is carried to extreme length in these decisions. Where a person has given definite notice that he will no longer subscribe, we can see no reason why he should be compelled to return one or more copies of the paper as an earnest of his declination."

There are, however, possible circumstances under which acceptance might reasonably be considered to be implied, as where, for instance, the person receiving the publication has due notice of the liability he may incur and fails after such notice to order the publication discontinued. The publisher obviously can have no right to renew a subscription without the subscriber's actual or implied consent, but there are circumstances under which such consent may be implied from the silence of the person who continues, without protest, to accept the publication for an unreasonable length of time.—*The Green Bag*.

LAW LIBRARY.

I. THE ALL-INDIA DIGEST (CIVIL). 1811-1911. VOL. II. By T. V. Sanjiva Row. "Appeal to Privy Council," to "Civil Procedure Code." The Law Printing House. 1912.

2. THE INDIAN DECISIONS (Old series). Vol. 4. Supreme Court Reports, Bombay. Perry's Oriental Cases and Perry's Notes of Cases.

3. THE GUARDIAN AND WARDS AND INDIAN MAJORITY ACTS. By the Lawyer's Companion Office.

4. THE INDIAN REGISTRATION ACT. By the Lawyer's Companion Office.

The books which head the present notice have the common link of being the publications of the Law Printing House and are, therefore, grouped together for the purpose of review. A cursory glance, however, at the descriptive title of each will show at once that they differ widely in scope and compass. The earlier volumes or the former editions of these have already formed the subject of review in these pages, and their general characteristics have been pointed out. We have nothing to add to what we have so often said. Repetition will serve no useful purpose. The profession and the public have had opportunities enough for them to get an insight into their usefulness and valuableness. The original high qualities as to both form and matter have been well kept up, and we have great pleasure in recommending them again to the acceptance of those to whom they must have proved good friends in need.

LAW OF CONTRACTS (English and Indian). By Trikam Lal R. Desai, B. A., LL. B., High Court Pleader, Bombay. Fourth edition. "Lawyer" Office, Girgaon. 1912. viii, 245, 109. viii pp. Price Rs. 4.

A law book which has passed through four editions in the course of nine years bespeaks its own popularity and does not stand in need of any extraneous adventitious help in order to

find a fit audience for itself. It is not two years since we passed the third edition of Desai's Law of Contracts in review (see 7 A. L. J., 119), and we then gave expression to our opinion of it. We can do nothing else now than registering our high sense of the merits of this small book. We notice, however, an omission made by us in our previous review, for we failed to point out, which we do now, that a table of cases is an indispensable adjunct to a legal publication. We consider the want of it a real defect, and we hope that in the next edition which, we trust, the book will soon attain, this will be made up. It is our firm belief that students will have themselves to thank for any breakdown at their examination when we find that their needs are so well catered for by men so eminently qualified as Mr. Desai. We again cordially welcome this small book and recommend it to our students who are preparing for the Previous Examination.

HINDU LAW AS ADMINISTERED IN BRITISH INDIA—By Sir Ernest John Trevelyan, D. C. L., Barrister-at-Law ; Fellow of All Souls' College, Oxford ; Reader in Indian Law in the University of Oxford ; Lecturer on Hindu and Mahomedan Law to the Council of Legal Education ; late a Judge of the High Court of Calcutta. Thacker, Spink & Co., 1912. cii, 626 pp. Price Rs. 20.

The name of Sir Ernest Trevelyan is a sufficient guarantee of the usefulness of this book, and no one will dare question its right to be included in every representative library. It does not lay any claim to originality—and, in fact, there can be none where the subject has been handled times out of number. Hindu Law as at present administered is the outcome of precedents—is more or less judge-made, and the original texts have come to possess only an antiquarian interest. Whether this is good or bad, this is not the proper place to discuss ; but there can be no doubt that the method works well. Now, before this Sir Ernest Trevelyan had brought out two books dealing with special topics of Hindu Law, *viz.*, *Hindu Family Law* and *The Hindu Law of Inheritance*. The present work includes the materials contained in those two works with the addition of a chapter on the law of Religious and Charitable Endowments (Chapter

XIX) and the incorporating of some observations on the Law of Gifts in the Chapter on Wills (Chapter XVIII). We have already observed that the learned author makes no pretensions to originality in this work. But that is not an assertion which should be made into a demerit of the work. There is no room at present for originality in writing a book on Hindu Law. Sir Ernest's long connexion with India and his subsequent career as Lecturer on Hindu Law constitutes a potent claim entitling him to delve in a subject which the investigations of Macnaghten, Strange, West and Buhler, Mayne and a host of others with whose names we might fill almost a full page have made anything but dull. And though last in order of time, it yields to none in point of interest and its remarkable plenitude of matter. In fact the weight of authorities might be said to be almost oppressive. Like Sir Rowland Wilson's Anglo-Mohammadan Law and Sir Ernest's two other books, the law is stated in the form of definite propositions so as to be intelligible and helpful alike to the practitioner and the layman, and it is not attempted to expound disputed law points.

And the reason is obvious. Sir Ernest does not profess to write a discursive treatise, but wants to make of his book a finger-post pointing the way to decisions and discussions by means of copious references to all available decided cases and classical text-books. The statements of the legal formula, if we may so call them, are made in language which is a model of conciseness, preciseness and lucidity. No one who reads this book would have any ground for complaint on the score of obscurity. It is pre-eminently a book for a busy lawyer who wants to have his law in a nutshell, and his authorities ready at a glance. There may be a dark corner here and another there, but upon the whole Sir Ernest has manipulated this subject of broad expanse in a way which radiates light into it and makes it the sure guide of every one who will have the time and the inclination to dig into it for information.

The reputation of Messrs. Thacker, Spink & Co., the well-known publishing firm of Calcutta, is firmly established so that a line from us is not likely to make or to unmake it. But even so the work is sometimes done so excellently as

to compel admiration. And that is so in regard to this publication. Great care has been bestowed upon the form of the book. The binding is very strong and the printing is neatness itself. Everything is of a piece with the intrinsic merits of the book, and the price is commensurate with the wealth of matter compressed within from cover to cover.

THE ANNESLEY CASE. Edited by Andrew Lang. Notable English Trials. 1-371 pp. Butterworth & Co., (India) Limited. Price Rs 4.

It must be with a feeling of deep melancholy that the mind will always ponder over this book which is the latest addition to the series of *Notable Trials* which have held the public attention for sometime now. For, not long ago between the appearance of the present volume and the date at which we are writing this note, its accomplished editor has passed away. Hushed now for ever is the music of that pen of which it might be said *nihil tetigit quod non ornavit*. Literature had early in life marked him for her own; and whether his subject was the grave or the gay, a breezy newspaper article or a serious dissertation on folklore and anthropology, light verse-making or original research in the domain of history, there is perhaps no department of literature which Mr. Andrew Lang's subtle and versatile genius had not penetrated and which he did not illuminate by his magic touch. Tennyson said of Wellington that he was the last great Englishman, and we may without inappropriateness speak of Mr. Lang as the last great writer of 'English undefiled.' *Sic transit gloria mundi*, but long off is the day when he will cease to delight and instruct a reader of his writings. For, he is

"One of the grand old masters, one of the names sublime
Whose trampling footsteps echo down the corridors of time."

Mr. Lang is anything but dull, and his introduction to this volume occupying a fifth of the whole enlivened as it is by delicate touches throughout is the most pleasant reading—a literary and intellectual treat. In explaining the inclusion of this case among the English Trials he says that "the case is too curious to be omitted," and it is this quality of it which attracted the singular mind of Mr. Andrew Lang.

According to Sir Leslie Stephen the facts of the Annesley case "descends to the level of romance." And these facts are simple enough. The action was nominally one for the ejectment of a person who had taken a lease from James Annesley. The central question in the case was whether the lessor of the plaintiff (tenant) was the legitimate issue of Arthur Lord Altham. This Lord Altham was an Irish nobleman of disreputable antecedents who owned and disowned, as occasion suited him, the legitimacy of the claimant. The evidence on both sides is voluminous and out of the tangled skein of improbabilities and contradictions it is difficult to unravel the truth. In any event the defendant was in possession and he had had more opportunities of producing perjured evidence than the plaintiff's lessor. The claimant's case was established up to a certain point as will appear from a perusal of the *resume* of the evidence in the Introduction, but the point that he was the lawful son of the deceased lord by his wife was still doubtful, because the latter too was dead. Mr. Lang has brought to light two hitherto unpublished affidavits made by Sandford and White, respectively, in which it was sworn that Lady Altham had made a declaration as to the legitimacy of the claimant. But we must bear in mind that the prosecution for perjury which was set on foot against one Mary Health, the principal witness for the defendant, was unsuccessful, and she was acquitted. The trial lasted fifteen days and was spoken of by the Lord Chief Baron as the "longest trial ever known". The verdict after all was in favour of the claimant. But still it is not easy to come to a definite opinion. This trial has furnished materials for the groundwork of one of Charles Reade's novels known as *The Wandering Heir*.

Out of the whole lot of volumes which form part of this interesting series the volume under notice will claim the greatest share of attention by reason of the fascinating introduction as well as by reason of the fact that it was the last offspring of Mr. Andrew Lang's pen. The other general characteristics remain the same. And Messrs. Butterworth and Co. have done immense service to the profession and the public by placing before them a record in which will be found plenty of pleasant reading and which otherwise would have been "left to repose undisturbed on the repulsive shelves of a lawyer's library."

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DEFAMATION.

The criminal law of this country with regard to defamation depends on the construction of section 499 of the Indian Penal Code and not what may be the English law on the subject. According to the theory of the criminal law of England, the essence of the crime of private libel consists in its tendency to provoke breach of the peace. In the words of the authors of the Code, however, "the essence of the offence consists in its tendency to cause that description of pain which is felt by a person who knows himself to be the object of the unfavourable sentiments of his fellow creatures and those inconveniences to which a person who is the subject of such unfavourable sentiments is exposed."

The Penal Code thus defines the offence of Defamation. "Whoever by words either spoken or intended to be read or by signs or by visible representations makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person, is said (except in certain cases in the Code mentioned) to defame that person." It is immaterial whether the libel make an imputation to the prosecutor in a direct manner or indirectly by such hints or modes of expression as are likely to convey the intended meaning to the person to whom the libel was published; taking the words in the sense in which the rest of mankind would ordinarily understand them, it is for the jury to say whether in their minds they convey the idea imputed, and the same where the imputation is conveyed obliquely or

indirectly, by signs or by pictorial or other representations or symbols, or by way of question, conjecture or exclamation or by insinuation, irony or the like.

Prima facie a man's words must be judged according to the meaning which is ordinarily put upon them. When words are capable of an innocent meaning as also of a defamatory meaning, it is a question of fact which meaning they conveyed: provided that the burden of proof is in every case on the party attributing to words a meaning that exceeds or qualifies their natural or ordinary meaning, and such proof is admissible only if in the opinion of the Court the words are capable of the alleged meaning. When the meaning of the imputation is ambiguous or where it does not on its face apply to the complainant, evidence is admissible to explain its meaning or to show who was the person really meant. In all such cases the English practice is to state in the criminal charge the meaning which the prosecution intends to affix to the libel, by means of averments which are technically called innuendoes. The office of innuendoes is to explain the meaning which the defamatory matter was intended to convey and was capable of conveying, not to extend its natural meaning or to add to it some meaning which it cannot bear.

It is not defamation to impute anything which is true concerning any person if it be for the public good that the imputation should be made or published. "Whether or not it is for the public good is a question of fact." Although, therefore, the imputations may be true and made for the public good, yet on considering the manner of the publication, *i. e.*, in a newspaper, the accused may be held not to have published it for the public good (I. L. R., 19 Bombay, 703). Further a libel against an individual may consist in the exposure of some personal deformity, the actual existence of which would only show the greater malice in the accused; and even if it contain charges of misconduct founded in fact, the publication will not be the less likely to produce a violation of the public tranquillity. It has been observed that the greater appearance of truth there may be in any malicious invective, it is so much the more provoking, and that in a settled state of Government the party aggrieved ought to complain, for every injury done to him in the ordin-

any course of law, and not by any means to revenge himself by the odious proceeding of a libel. Even where it is for the public benefit, *i.e.*, for the benefit of a portion of the public, that certain facts should be made known, the privilege conferred by this exception may be taken away if the facts are disseminated to a circle of readers wider than those who can possibly be interested in the facts communicated.

The person who defames another must be "intending to harm or knowing or having reason to believe that such imputation will harm" the reputation of the person defamed. It is probable that this clause throws no greater burden upon the prosecution than arises under the English law from the word "malicious" which is part of the definition of libel. By malice, as necessary to give a cause of action in respect of a defamatory statement, legal and not actual malice is meant, while by legal malice is meant no more than the wrongful intention which the law always presumes as accompanying a wrongful act without any proof of malice. The presumption of law may be rebutted by the circumstances under which the defamatory matter has been uttered or published, but ordinarily every man is presumed to intend the natural and ordinary consequences of his act, and if the tendency of the publication was injurious to the plaintiff, the law will assume that the defendant by publishing it, intended to produce the injury which it was calculated to effect, and he will not be heard to say that he had no wish to hurt the prosecutor and did not suppose he would be hurt.

In order to bring within the terms of this definition matter relating to a deceased person, it will be necessary to show not only that the deceased might have complained of it, but also that it was written or spoken with the intention of insulting his surviving relations. A prosecution may be maintained for defamation of a deceased person, but no suit for damages will lie in such a case.

The proper meaning of a "privileged communication" is this: that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of a plaintiff and puts it on him to prove that there was malice in fact, that the defendant was actuated by personal spite or ill will, independent of the

occasion on which the communication was made, and that under the pretence of doing his duty or protecting his lawful interest, the defendant has been pursuing some by end or gratifying his illwill. An occasion is privileged when the person who makes the communication has an interest or a duty legal, social or moral, to make it to the person to whom he does make it and the person who receives it has a corresponding duty or interest to hear it. Further the statement complained of should be made with a belief—based on reasonable grounds—in its truth, and should be delivered in the honest belief that the party was performing his duty in making the communication. Anything which a person may say or write in maintaining his own interests may also be said or written by his solicitor or agent or any other person to whom the protection of those interests is entrusted.

When the occasion is shown to be privileged and there is such evidence before the court as raises a presumption that the defendant was acting within one of the exceptions, the prosecution must prove malice, which at this stage means, a state of the mind amounting to actual malice as the moving cause of the particular imputation. Even this, however, will not be sufficient where the communication made was one which it was the absolute duty of the defendant to make under the circumstances of the case. The motives under which a man acts in doing a duty, which it is incumbent upon him to do, cannot make the doing of that duty actionable however malicious that may be.

When the statement made on a privileged occasion is not compulsory but optional, so that proof of express malice is sufficient, this proof is not afforded merely by showing that the statement was false. The falsity of the statement is an element in determining the existence of malice, but does not itself establish it. The question still remains whether the defendant was using or abusing his privilege. The use of extravagant and excessive language indulged in without due care and attention in conveying imputations which are themselves privileged, has been held to destroy the privilege. Evidence of other libels upon the prosecution, either before or after the libel complained of, is admissible for the purpose of proving actual malice or deliberate publication.

There are some cases in which the privilege is so absolute as to amount to a complete immunity, even where there is the most express malice. One of these cases is that of speeches made in Parliament or petitions addressed thereto. A more common instance is the immunity attaching to statements made in judicial proceedings. Neither party, witness, counsel, jury nor judge, can be put to answer civilly or criminally for any words used orally or in writing in the discharge of his respective functions (9 Bo., L. R., 1287). This immunity is based on the broad principle that it is essential to the full and fearless administration of justice that those who are protecting their own interests or discharging their duties in a judicial proceeding, should be under no apprehension of ulterior proceedings from the opposite party.

The language of exceptions 7 and 9 does not import any such absolute immunity as is recognised by English law. Each of those exceptions uses the term "good faith" as an element in the definition, and this is repeated in each of the illustrations annexed. Except as to this, the English rule has been followed by the Indian Courts in suits against a judge, party or witness, for defamatory expressions used in the conduct of a suit.

It is not defamation to publish or cause to be published in good faith a substantially true and impartial report of the proceedings of a public judicial or legislative body or of the result of any such proceedings, unless such publication has been forbidden by such body. The protection afforded to a publisher by exception 4 is based on the principle that the persons whom he addresses or the general public have such a right or interest to know the particular matter as will justify its being spread abroad. The general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to the private persons whose conduct may be the subject thereof. The report should, however, fairly represent to the reader what he could have learnt for himself if he had been present and the reporter ought not to mix up with his report, comments of his own, but must attend to the truth and put it forward honestly and in good faith and to the best of his knowledge and ability. Nothing is said in Exception 4 as to good faith, the only

requisite being that the report should be substantially true. Under these circumstances it would be interesting to consider whether a Barrister has any cause of action against the publisher of a paper for publishing reports of only those cases which the court had decided against the parties for whom the plaintiff had appeared.

Reports of the proceedings of a quasi-judicial body which is entrusted with the control of persons and matters in which the public are interested and in respect of which they are entitled to information, are also privileged. So are government proceedings relating to matters of national importance. Whether a report of the proceedings of a municipal body in the course of which aspersions are cast upon an individual would have any privilege on the ground of public interest, seems not quite settled.

There is another distinct class of cases where what is protected is opinion, not assertion, and that only in regard to persons or things which affect the public by their nature or their interest. They are all particular instances of the general principle of English law that fair comment upon public men or upon matters of public interest is not libellous. It is only where the writer goes beyond the limits of fair criticism and makes his commentary a cloak for malice that his criticism passes into the region of libel at all. When, therefore, a defence of fair criticism is set up, it is necessary to show (1) that the matter was of public interest; (2) that the statement of fact was accurate, and (3) that the comment was fair, *i.e.*, honest and relevant.

Matters become of public interest either by their own nature or because the person criticised has chosen to make them so. The private life and opinions of any one are not matter of public interest, unless so far as they affect his fitness for the discharge of any public duties. The distinction cannot too clearly be borne in mind between comment and criticism, and allegations of fact such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man and quite another to assert that he has been guilty of acts of misconduct or is actuated by wicked or corrupt motives.

Lastly, the mode of expression should not exceed the reasonable limits of fair criticism. The alleged facts upon which the criticism rests should be accurate, and the comments must have been made with an honest belief in their justice and with the exercise of a reasonable degree of judgment and moderation.

The last element in the law of defamation is that the imputation should be made or published. So long as such matter is unknown to any one save the author and the object of it, no "imputation" is made at all, and the maker does not incur any liability, except in the case hereinafter mentioned. Mayne lays down the following distinction between "making" and "publishing." A man "makes" an imputation when it is disseminated by the very act which brings it into existence as when he utters it in the presence of others or makes a sign or chalks up a representation which conveys a defamatory idea. He "publishes" it when he gives currency to defamatory matter which had previously existed, as by repeating a conversation or by posting a letter or printing an article in a paper. Sending a libel to a man's wife is a sufficient publication.

Documents containing defamatory matter, even if published only to the person defamed may be made the subject of indictment though such publication would not give a cause of action—if such publication is made with intent to provoke the prosecutor and incite him to a breach of the peace, and the document is such as must reasonably tend or be calculated to provoke a breach of the peace. And even where the imputation made is not defamatory, yet if it is made in the hearing of the person who is the object of it for the purpose of provoking that person to break the public peace, it will be punishable under section 504. This section provides a remedy for the use of abusive or insulting language and the offence constituted thereby is not made to depend upon the sensitive feeling or excitable temper of the person insulted or on the truth or otherwise of the allegation made, but on the intention or knowledge of the offender of causing a breach of the peace, whether the person insulted does or does not accept the provocation in the manner intended.

Under English law, a person who sells in the ordinary way of business any defamatory publication is liable both civilly and criminally even though he proves that he knew nothing of its nature and supposed it to be of an innocent character. Under the Penal Code, however, a person is only liable for making or publishing an imputation "intending to harm or knowing or having reason to believe" that such imputation will do harm. These words cannot mean less than the wilful intention to do a wrongful act or other connivance at or tacit permission to publish libels of the sort complained of which would amount to an authority to publish any particular libel. The Code makes no exception in favour of a second or third publication as compared with the first, and repetition of rumours, however prevalent, is not received as an excuse: for "a wrong is not to be justified or even excused by a wrong." If a man receives a letter with authority from the author to publish it, the person receiving it will not be justified, if it contains libellous matter, in inserting it in a newspaper, no authority from a third person will defend a man against an action brought by a person who has suffered from an unlawful act. Similarly in civil matters it is no defence to an action for oral slander for the defendant to show that he heard the slander from another and named the person at the time, unless he also show that he believed it to be true and uttered the slander on a justifiable occasion.

This may seem a hard rule, but the discretion vested in courts of law as regards assessing the amount of damages to suit the circumstances of each particular case, and the rule generally recognised that except in cases of acts which if continued or repeated would tend to establish an adverse claim of right, nothing is a wrong of which under all the circumstances, a person of ordinary sense and temper would not complain, and also the rule of law, limiting the right of action for slander as distinguished from libel, would be effectual to prevent it from having oppressive results; and if the damage arise simply from the repetition, it is said, the originator will not be liable except (1) where the originator had authorised the repetition, or (2) where an actual duty was

cast upon the person to whom the slander is uttered, to communicate what he has heard, to some third person.

The place of publication is only material with regard to jurisdiction. When a libel is posted in one district and received and opened in another, the offence of publication takes place and may be tried in the latter district. Under section 198 of the Criminal Procedure Code, no Court shall take cognisance of any offence falling under Chapter XXI of the Penal Code except upon a complaint made by some person aggrieved by such offence.

Every charge of defamation contains assertions of fact and assumptions of law. It is the business of the jury to find whether the assertions are true and of the judge to direct them as to whether the assumptions are sound, *i. e.*, the judge directs the jury as to the law, leaving them to find the facts, and their verdict ought to be such as the judge directs to be appropriate to the facts arrived at by them. The question whether an occasion is privileged, if the facts are not in dispute, is a question of law only for the judge, not for the jury; similarly, whether the matter commented on is one of public interest is for the Court to decide; whether the comment is fair and *bona fide* is essentially a question for the jury—provided there is any evidence upon which they can so find. Whether there is any evidence upon which such a conclusion can be arrived at is again a question of the Court, but if there is any such evidence, the decision as to the effect of such evidence is wholly for the jury.

We now turn to the Common Law which presents minute distinctions between spoken and written words as affording a cause of action, spoken words being actionable *per se* only where special damage can be proved to have been the natural consequence thereof, or when they convey the following kinds of imputation, *vis.*, imputation (1) of a criminal offence (not necessarily an indictable offence) for which corporal punishment may be inflicted; (2) of a subsisting contagious or infectious disorder tending to exclude the plaintiff from society, *e. g.*, leprosy or the plague, &c.; (3) injurious to the plaintiff and concerning his office profession, trade or business, and (4) of adultery or unchastity to a woman plaintiff. It will have been observed that the Penal Code makes no distinction

between slander and libel. The Common Law contains an artificial theory of malice, now reduced in fact to the doctrine, that certain exceptions excepted, a man acts at his peril in making defamatory communications. The Penal Code does not make wrongful intention, but does make "knowing or having reason to believe" that the imputation uttered will harm the reputation of the person it concerns, an essential part of the offence. The test of words being defamatory or not, is, according to English authority, an "external" one: the question is what their natural effect would be, not whether the utterer knew or might have known it.

There is an elaborate system of exceptions, which is, however, reducible to sufficiently intelligible grounds of public policy and social expediency. In the Penal Code, following the English criminal law, truth is a justification only if the publication is for the public good. Such is not the English rule as to civil liability; the substantial truth of the imputation, on whatever occasion and for whatever purpose made, is an absolute defence. Even in such cases, however, the purely wanton raking up of the past events of a man's life appear to be not always capable of justification, and if there is gross exaggeration, the plea of justification will fail.

In order to found an action for libel the plaintiff must prove that the statement complained of is (1) in writing, (2) defamatory, and (3) published. For civil purposes a person may be said to defame another if he makes to any third person a defamatory statement concerning that other. A statement is defamatory which conveys, concerning a person, any imputation, tending to bring him into hatred contempt or ridicule, or being made concerning him in the way of his office, profession or calling, tends to injure him in respect thereof.

The wrongful intention of the defendant will be matter of inference from the nature of the publication. It is a general rule that an act unlawful in itself and injurious to another is considered both in law and reason to be done *malo animo* towards the person injured, or in the words of Sir Frederick Pollock, "every one commits a wrong who defames another without lawful justification or excuse." This definition does

away so far as civil liability is concerned, with the fiction of "implied malice" or malice in law, a course which seems clearly authorised by Lord Blackburn's language in *Capital and County Bank v. Henty*.

In the following cases, there is said to be "absolute privilege," *i. e.*, the wrong of defamation is not committed though the statement made may be defamatory, and whatever be the intention, motive or belief of the person making the statement (1) if the statement is true, (2) if the statement is made in the course of a judicial proceeding before a competent Court and has reference to the matter before it.

The following statements are said to be made on "a privileged occasion" and do not amount to defamation if made in good faith and in a manner not exceeding what is reasonably sufficient for the occasion. Where a statement is made (1) in discharge of a legal, moral or a social duty, existing, or by the person making the statement believed in good faith to exist, of giving information in the matter of the statement to the person to whom it is made; (2) to a public servant or other person in authority, in a subject matter (reasonably believed to be) within his competence, with a view to the prevention or punishment of an offence or redress of a public grievance; (3) with a view to the reasonably necessary protection of some interest of the person making the statement; or (4) with a view to the reasonably necessary protection of an interest, or the proper performance of a duty, common to the person making the statement and the person to whom it is made.

When there is a duty, whether of perfect or imperfect obligation as between two persons which forms the ground of a privileged occasion, the person exercising the privilege is entitled to take all reasonable means of so doing, and those reasonable means may include the introduction of third persons, where that is reasonable and in the ordinary course of business; and, if so, it will not destroy the privilege. But sending defamatory matter by telegraph (under ordinary circumstances) or on a postcard or the communication of such matter by any means to an excessive number of persons, or to persons having no interest, or the communication by

negligence to one person of matter intended for and proper to be communicated to another person, or the use of intemperate language, may make a statement wrongful even if the occasion is otherwise privileged.

With regard to the damages recoverable in actions for defamation, their amount will materially depend upon the nature of the libel, the extent of its circulation, the position in life of the parties, their conduct and behaviour during and previous to the proceedings and the surrounding circumstances of the case. The damages must be assessed once for all; and no fresh action can be brought for any subsequent damage except where the words are actionable on the happening only of special damage.

NAYAN H. PANDIA,

CASES AND COMMENTS,

ENGLISH AND INDIAN.

It is a well-known rule of law that all actions and suits should be brought in the name of or against specified individuals, unless law expressly provides otherwise. To meet the convenience of modern times, the legislature has in various enactments enacted exceptions and authorised courts to entertain suits by or against combinations of individuals in their Collective or Associated or registered names. But to come within the exception, the terms of the particular enactment relied on must be complied with. If a case falls outside the scope of such an enactment, the common law rule of specifying each individual prevails. The case under comment is an illustration. There, the suit was against the defendant society and its trustees for payment of moneys alleged to be due to a member under the rules in respect of superannuation benefits; and one of the questions was whether such a suit was maintainable. The society was a trade union registered under the Trade Union Acts of 1871 and 1876. On behalf of the society two pleas were urged, *viz.*, that the society could not be sued in its own name, and that, the object of the Association being in restraint of trade and therefore illegal, no suit lay. The suit was dismissed by two of the Lords on the first plea and by the other Lords on the second plea. So far as the first plea is concerned, it may be noted that the Trade Union Acts did not support the action brought and hence the common law rule was held to make the suit bad.

Russell
v.
Amalgamated
Society of Car-
penters and
Joiners,
(1912) A.C., 421.

Company law—Rights of minority to question acts of the majority.

The adjustment of the rights of a minority of shareholders against the majority depends upon a compromise between two principles, *viz.*, that a person should not be prejudiced as to his property without his consent or against his wishes, and that where a number of persons combine in an undertaking, the wishes of the majority should prevail, otherwise no

Dominion Cot-
ton Mills Co.,
v.
Amyol.
(1912) A.C.,
546.

undertaking would ever succeed. There is naturally a conflict between these two, and hence the necessity for a compromise. The law has been very clearly laid down by the Judicial Committee in *Burland v. Erle*, (1902) A. C., 83 in these words :—" It is an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers, and, in fact, has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company the action should be *prima facie* brought by the company itself. But an exception is made to the second rule where the persons against whom relief is sought themselves hold and control the majority of the shares in the company and will not permit an action to be brought in the name of the company. In that case the courts allow the shareholders complaining to bring an action in their own names....It is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have had if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are therefore confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property or advantages which belong to the company or in which the other shareholders are entitled to participate. There is yet a third principle. Unless otherwise provided by the regulations of the company a shareholder is not debarred from voting or using his voting power to carry a resolution by the circumstance of his having a particular interest in the subject-matter of the vote."

Their Lordships applied these principles in the case under comment and held that it was for the minority shareholders to show that the majority of the shareholders either acted *ultra vires* or so abused their powers as to deprive the minority of their rights.

To the same effect is *Goodfellow v. Nelson Line*, (1912) 2 Ch., 324.

Clog on equity of redemption.

The subject of clogs on equity of redemption seems, in spite of numerous decisions, to be so little understood in this country that the citation of another case decided by the highest authority in England ought not to be considered out of place. There, A was the lessee of a hotel for 20 years from 12th June, 1905, to 12th June, 1925. In December, 1907, he sold the residue of the term of the lease to the defendant-appellant. On 27th December, 1907, the appellant executed a mortgage for £500 in favour of the respondent company which contained a clause that the mortgagor will repay the said sum of £500 by 209 monthly instalments, 208 of £2-8-0 each and 1 of 16 shillings; that he should not redeem except by the instalments without the written consent of the company; and that during the continuance of the security the hotel should be a tied house, *i.e.*, it should buy its beers, spirits, wines, etc., solely from the company. Sometime in 1909 the company were unable to supply the beers, etc., required for the hotel, and the defendant, considering himself freed from the tied clause covenant made arrangements elsewhere. The company sued for damages for breach of the covenant, and the defendant desired redemption. He had previously offered to redeem but the company refused to be paid off, insisting that £500 should remain (to be paid by the stated instalments) to cover the tied covenant upon the hotel which the mortgagor had given. This, it will be seen, was a collateral advantage secured to the mortgagee and had nothing to do with the mortgaged property; and was held to be a clog.

James
Fairclough
v.
Swan
Brewery Co.,
(1912) A.C., 565.

Proof of possession.

It is a well settled rule that possession of land must be considered in every case with reference to its peculiar circumstances, the character and value of the property, the suitable and natural mode of using it, and the course of conduct which its proprietor might reasonably be expected

Richard J.
Kirby
v.
John J.
Cowderoy.
(1912) A.C., 599.

to follow with due regard to his own interest; and their Lordships held that in case of wild land without value, payment of taxes due in respect of it for a large number of years was good proof of possession of the person paying.

Birkbeck
Permanent
Benefit Build-
ing Society,
In re.
(1912) 2 Ch.,
183, C. A.

Ultra Vires transaction of a registered company.

That people who deal with registered companies and associations should be very careful to ascertain the limits to the powers of such persons is illustrated very forcibly by the marginally noted case. The object of the society formed under the provisions of the Building Societies Act, 1836, was to enable the members to raise a fund out of which they might be individually enabled, as provided in subsequent rules, to purchase or erect a dwelling house or houses, or other real or leasehold estate. The shares were of £50 each, payable by a monthly subscription of 6s. 6d. They were divided into two classes, A and B, the first having larger privileges. The Board of Directors had power to borrow money either from their banker or any other source. The business of the society was from the first carried on with great success and attained large dimensions. The society also from its formation received sums on deposit from its members and the public generally, and this branch of the society's business increased to very great proportions and was carried on as a regular bank under the name of Birkbeck Bank. In 1911, owing to a run on the Bank, the society failed and presented a winding up petition. The main question raised in the case was as regards the precise position of the depositors with reference to the holders of A and B shares. The object of the society being limited, receipt of deposits generally from the public was obviously beyond its powers. It was, however, contended that the Board of Directors had power to borrow money from any source, and it may be taken that in receiving deposits they borrowed money from the depositors and therefore acted within their powers. NEVILLE, J., had no difficulty in holding that the power was limited to the purposes of the society and was not general. This being so, the deposits were illegal and did not create the relation of debtor and creditor. The

depositors could not therefore compete with the holders of A and B shares. This view was affirmed by the Court of Appeal.

Obstruction of lights—Measure of damages

A was the owner of two houses fronting upon a street, and the windows facing the street were ancient lights. He was also the owner of a piece of land immediately at the rear of and adjoining the houses. The defendant erected a building on the opposite side of the street and thereby obstructed the plaintiff's ancient lights. In an action for damages it appeared that A's houses were old and dilapidated and would soon have to be demolished; that the neighbourhood was no longer residential but was adapted for factories and shops; that the site of the houses, together with the piece of land in the rear, would form a building site suitable for a warehouse or factory; and that the value of this building site as a whole would be diminished by the obstruction of light in the front. The Court of Appeal affirmed the decision of NEVILLE, J., that the damages recoverable by A were not limited to the depreciation in the value of the houses, but extended to the diminution in value of the whole of A's premises considered as one building site. There is not the least doubt that there was no prescriptive right in respect of the land at the rear and that a suit confined to that only would have failed. The reasoning on which the judgment is based is this. A had ancient lights in respect of the two houses. These were obstructed by the defendants' act. A was entitled to sue for injunction in respect of the obstruction caused; and if he had sued for an injunction and obtained it, the benefit would have accrued for the whole of the premises, including the land at the rear. Hence, the damages should be measured in respect of the total loss referred by A. The *Tilbury case*, 24 Q. B. D., 326, was relied on. There, obstruction was caused to lights which were ancient and to lights which were not ancient; and damages were awarded in respect of obstruction to *all* the lights. Therefore, it seems that the owner of a dominant tenement is entitled to such damages as result from an injurious act, irrespective of the fact whether he has acquired a right of easement in respect of a part of his pre-

Griffith
v.
Richard
Clay and
Sons,
(1912) 2 Ch.,
291, C. A.

mises, provided of course that the act which has caused injury to the latter necessarily causes injury to easements acquired by prescription. Section 33 of our Easements Act, read with Explanation II, does not seem to be opposed to this view.

In re Wareham,
Wareham

Apportionment of the income of wasting property between life tenant and remainderman.

Brewin, (1912)
2 Ch., 312, C. A.

The case of *Howe v. Earl of Dartmouth*, 7 Ves. 137A, upon which section 16 of our Trusts Act is based, decided that where a wasting estate is settled on several persons in succession, it is the duty of the trustee to convert the estate into hard cash at once and to give to the life tenant the income arising from the cash; and, if that is not done or is impracticable, a court of equity will apportion the income arising from the wasting estate in the same way as if the conversion had been made at the right moment. The case under comment is an illustration of the same. There, a leasehold estate (that is, a wasting estate) was bequeathed by will so that the testator's wife was entitled to the rents, issues and profits thereof for her life, and after her death, the estate was to go in remainder to other persons. It was held that there was no intention on the part of the testator that the leasehold should be enjoyed *in specie* by the widow, and that, therefore, she was entitled not to the whole of the rents and profits of the leaseholds, but only annually to a sum equal to the dividends which would be produced if the leaseholds had been sold a year after the testator's death and invested in consols.

In re Trevor-Batye's Settlement,
Bull
v.
Trevor-Batye
(1912) 2 Ch.,
339.

This case is closely allied to the previous and illustrates section 17 of our Trusts Act. It is the duty of a trustee to be impartial as between a life-tenant and the remainderman, and to do nothing which would give the former a larger income at the expense of the latter. If a trustee acts contrary to this, a court of equity apportions the proceed of the act in the same way as if the trustee had done his duty. A tenant for life is entitled to the income of the property and the remainderman to the *corpus*. In making apportionment, the question before the court is as to what should legitimately come under the denomination of income. In the case under

comment it was ruled that the proceeds of sale arising from the periodical cutting of timber trees, after deducting the expense of replanting and fencing incurred in a proper course of management, were income to which the tenant for life was entitled.

Creditor entitled to file petition of bankruptcy.

In re A debtor,
(1912) 2 K. B.,
533, C. A.

The Bankruptcy Act, which is the model for our Insolvency Acts, entitles a creditor to whom a certain sum of money is due from a debtor to file a petition to declare the latter insolvent, and empowers the court to dismiss such a petition if the debtor is able to pay his debts. The creditor who can serve notice of bankruptcy is one entitled to receive the debt from the debtor. Hence, if before the date of such notice the creditor has himself committed an act of bankruptcy and a trustee has subsequently been appointed after his being adjudged a bankrupt, the notice is invalid and the petition for declaration must be dismissed. The reason is that if the debtor offered to pay at the date of the notice, the creditor would not have been legally entitled to receive the debt.

Title of trustee in bankruptcy as against bona fide purchaser for value from voluntary donee.

In re Hart,
Ex parte Green,
(1912) 3 K. B.,
6, C. A.

The rule of relation back which was responsible for the decision of the case last cited was also involved in the present case. The English Bankruptcy Act relates an order of adjudication of bankruptcy back to the date of the act of bankruptcy on which petition is founded; whereas our Insolvency Acts make the order relate back to the date of the presentation of the petition. The title of the trustee or receiver to the debtor's property arises on such date. Hence any transfer for or without consideration made by the debtor subsequent to such date is necessarily void as against the trustee or receiver. This, however, does not affect a transfer made by a third person, *e.g.*, a person who became the owner of the property prior to such date by gift from the debtor. Section 47 of the Bankruptcy Act, on which section 36 of our Provincial Insolvency Act and section 55 of our Presidency Insolvency Act are based, renders void an

alienation of property, otherwise than one *bona fide* and for consideration, made within two years of the date of bankruptcy, as against the trustee or receiver. If a voluntary donee, the gift to whom would be void under the above section, transfers the property after the date of the act of bankruptcy or petition of insolvency to a person who pays consideration and is ignorant of the act of bankruptcy and of the fact that his transferor was a mere donee, such person is protected as against the trustee or receiver. The transferee's title starts from the date of the transfer but the trustee's title arose on an anterior date. The latter's title was, however, not to the property but to challenge its transfer and thereby acquire a legal title. Hence, the legal title of the transferee prevails.

Lodna Colliery
Co,
v.
Bipin Bihari
Bose.
39 Cal, 739.

Suit for land—No privity of contract between lessor and under-lessee

A grants a lease of a portion of his coalfields to B, with a covenant that neither should dig within 15 feet of the boundary line; in other words, that thirty feet of coal was the minimum distance to be kept between the workings of the collieries of the lessor and the lessee. The sanction for the covenant was payment of damages for loss sustained by the other side. B underlet to C who underlet to D. A sued D for damages for breach of the covenant. The first point decided was that the suit was a suit for land within the meaning of section 12 of the High Court's Charter Act, inasmuch as the suit was founded on a case of trespass *quare clausum fregit* which necessitated the title in respect of the coal within the reserved 30 feet being gone into. The second point decided was that there was no privity of contract between A and D and therefore the suit did not lie. In support of the latter point, *Timmappa v. Ramavenkana*, 21 Bom., 311, may be cited.

Harish
Chandra
Tewari
v.
Chandpur
Company,
39 Cal., 766.

Limitation Act, section 12 - Time for copy—Delay in signing decree.

Though according to law, the date of the decree is the date of the judgment, every one knows that a decree is not ready for delivery to the parties until some weeks after the delivery of the judgment. Again although an appeal lies

from a decree, the courts, for the purposes of section 12 of the Limitation Act, usually exclude only the time spent in obtaining a copy of the judgment. Naturally very often difficulties arise in the application of the rule of law on account of the rules and practice of the court. After much discussion the difficulty was got over in the early nineties by excluding the time spent in obtaining a copy of the decree appealed from, only when a copy of the decree could not be given before or with a copy of the judgment because of delay in the preparation of and signature on the decree. This, however, is merely an indulgence—at least so the courts say—and is therefore dependent on the exercise of due diligence on the part of the appellant in applying for copies. He should not wait until the signing of the decree before he applies for copies; and if he does, the risk is his. In any event he should apply before the period of limitation for the appeal as computed from the date of the judgment has expired. This is the moral of the case noted in the margin. There, a judgment was delivered by the High Court on 7th July, 1911. The decree was signed about 8th August, 1911. Application for copy was made on 26th January, 1912, and the application for leave to appeal to His Majesty in Council was filed on 30th January, 1912, that is, about 23 days after the limitation of six months had expired. An attempt was made to compute the six months from 8th August, 1911, but was unsuccessful.

Stamp Act, article 1—Acknowledgment of debt.

An acknowledgment in writing of a debt must be properly stamped before it can be received in evidence; and from time to time attempts are made to get writings admitted as proof of debts as being outside the category of acknowledgment. The case under comment is one of a successful attempt. There, in an account between the parties headed "account current" kept by the plaintiff, the defendant was debited with advances made by the plaintiff and credited with payments made by the defendant, the balances being carried forward half yearly. On an account being stated and

Galstaun
v.
Hutchison,
39 Cal., 789.

adjusted, a certain sum E. and O. E. was shown due by the defendant; the plaintiff appended the words, "I accept this as correct" and the defendant subscribed his signature thereto. The account was continued, the said sum being carried forward, and further sums were debited to the defendant, but there were no further items of credit. The signed adjustment of account was clearly an acknowledgment of indebtedness or liability within the meaning of section 19. of the Limitation Act, and the point involved in the case was whether it was an acknowledgment of a debt. The distinction which is rather fine, was drawn in *Brojender Coomar v. Bromomoyee*, 4 Cal., 885, *Brojo Gobind Shahu v. Goluck Chunder*, 9 Cal., 127, and *Nund Kumar Shaha v. Shurnomoyi*, 15 Cal., 162, and relying on these rulings the decision was that the writing was not an acknowledgment of debt. The distinction depends on the intention of the parties. If it was simply to authenticate the balance sheet but not to admit the debt, the writing does not come within article 1 of the Stamp Act.

Ramjidas
v.
Jankidas,
39 Cal., 802.

Right of agent to sue in his own name—Undisclosed principal.

Section 230 of the Contract Act tells us that an agent cannot sue in his own name in respect of contracts made by him for his principal, except in the cases mentioned in the section itself, one of them being "where the agent does not disclose the name of his principal." This, of course, presumes that the agent did not purport to act for himself but acted for another, whose name he has not disclosed, that is, that there is a real principal, a person other than the agent, on whose behalf the contract was made. If there is no such third person, and the person on whose behalf the contract is understood to be made is non-existent—the real contractor being the agent himself—the exceptions in the section do not apply; and we have the rule in section 236 of the Act that under such circumstances, the so-called agent cannot enforce the contract. For an earlier case, see *Sewduti v. Mesrope*, 34 Cal., 628.

Homicide—Rash and negligent act.

Where death of A has ensued on account of some act or omission of B, the first question is whether the effect produced was caused voluntarily, *i.e.*, was caused by means whereby he intended to cause it, or by means which, at the time of employing these means, he knew or had reason to believe to be likely to cause it. If the answer is in the affirmative, the case falls within the definition of culpable homicide, or hurt, but if the answer is in the negative, the case is one of causing death by a rash or negligent act. Though rashness or negligence has not been defined in the Penal Code, or anywhere in the Anglo-Indian Codes, the Courts in India have, without saying so in express terms, confined a rash or negligent act to acts the effect of which has not been caused voluntarily, for they have ruled as in the marginally noted case that where an effect is caused voluntarily, the act cannot be said to be rash or negligent. For instance, if B gives a *lathi* blow on A's head intending to hurt him, and the blow is so severe as to cause fracture of the skull and to cause death, A's death cannot be said to be due to rashness or negligence, inasmuch as B did not think of the consequences which might ensue from the blow on A's head. But suppose that B feeling frolicsome brandishes a heavy *lathi* in a place where some persons are about and the *lathi* comes in contact with A's head and kills him. Here death is due to a rash or negligent act, because the effect intended was not death or hurt or anything dangerous, and the act was done without due care to guard against dangerous consequences. Similarly, if B administers a poisonous substance to A, knowing or believing it to be poisonous, in order to make A ill for a time, and A dies, the act was done voluntarily and death was not due to a rash or negligent act. If, on the other hand, B administers a substance to A as a love-philtre or potion, not knowing the substance to be poisonous, which it is, and death ensues, the case may be one of causing death by a rash or negligent act, or no crime at all. If the substance was given to B by a person known by B not to be well disposed towards A for the purpose of being administered as a love-philtre, B ought to be careful, and omission to be so, brings

Pika Bewa
v.
Emperor,
39 Cal., 855.

the act within the category of rash or negligent acts. This is the decision in the case.

Hindu son's liability for father's obligation.

Rasiklal
Mandal,
v.
Singheswar
Rai, -
39 Cal., 843,
and
Chhakauri
Mahton
v.
Ganga Prasad,
39 Cal., 862

These two cases illustrate some of the liabilities of a Hindu son for the acts of his father. The Shastric text-books expressly include the obligation of a father as a surety amongst the liabilities of his son and the first case gives effect to that view. The point in dispute was that the father did not stand surety for a loan or for appearance or for honesty, for which alone his sons are liable; and it was held that a surety for a loan includes a surety for payment of money promised to be paid. For an earlier case, see *The Maharajah of Benares v. Ram Kumar Misir*, 26 All., 211. In the second case the question was as to liability for a tortious act of the father. The rule of *actio personalis moritur cum personæ* applies with certain well known exceptions, one of which is that when the tortious act of the deceased benefited his estate, the legal representatives are liable; and the other is when a decree for damages in respect of the tortious act has been obtained against the deceased. In the case under comment, the property in the hands of the deceased had been attached in his lifetime in execution of a decree for damages for the tortious act which consisted in obstructing a channel through which the plaintiff was entitled to irrigate his lands, presumably with a view to benefit the land of the person obstructing by reason of the increased supply of water. On the death of the judgment-debtor after attachment, his sons were brought on the record and they pleaded that they had obtained the property attached by survivorship and were not liable for the tortious act of their father. Mr. Justice MOOKERJEE, who delivered the judgment of the Court, examined the Shastric texts carefully and the various decisions on the point; and the conclusion he arrived at on the examination of the texts is that a son is not liable for (1) debts due to lust, (2) debts due for gambling, (3) debts due to spirituous liquors, (4) unpaid fines, (5) unpaid tolls, (6) useless gifts or promises without consideration or made

under the influence of lust or wrath, (7) suretyship debts, (8) commercial debts, and (9) debts that are not *Vyavaharika*. The exact meaning of this term is not clear and the conflict apparent on a perusal of the various decisions on the point is due to the different meanings attached to the term by the Judges concerned, so far as they considered the texts at all, or to deciding the cases on first principles without reference to the texts. Mr. Justice MOOKERJEE interpreted *Vyavaharika* to mean lawful, usual or customary, and held that the decretal debt was not, under the circumstances of the case, a debt "not *Vyavaharika*." The sons were therefore held liable.

Priority of title to shares in a company.

A died leaving certain shares in a joint stock company and a will by which he appointed B and C as his executors. B died in 1905, and C got the shares transferred to his own name and pledged them in 1908 with the National Bank of India for Rs. 16,000, which he misappropriated. In March, 1909, R. D. Sethna was, by order of the High Court, appointed Receiver of the estate of A. The Receiver sued C and the Bank for delivery of the shares. The defence was that the Bank was a *bona fide* pledgee for value and entitled to deal with the shares. and, in any event, was entitled to get the advance back before delivery of the shares. The Receiver gave notice to the company not to transfer the shares, but the Bank had not given notice of the pledge to it. It appeared that the Bank had through C notified to the company that C was desirous of selling, and D, one of the officials of the Bank, was willing to purchase the shares, and asked the company to transfer the shares. accordingly. This was after the Receiver's notice and the company refused to accede to the request. It is obvious that though the shares stood in the name of C, they belonged to the estate of A, and therefore the Receiver had a prior title to them. The Bank or D had not, according to the rules of the company, perfected its or his title to them. Hence, there could not be the least hesitation in upholding the title of the Receiver.

R. D. Sethna

v.
The National
Bank of India,
36 Bom., 334.

Narhar Raghunath
v.

-Krishnaji
Govind
Nadgavandi,
36 Bom, 368.

*Section 48, Code of Civil Procedure—Starting point for the 12 years—
Decree capable of execution.*

Section 48 of the Code of Civil Procedure prescribes 12 years as the ultimate period for putting in an application for the execution of a decree for the payment of money. The starting point is the date of the decree or the date or dates fixed for payment. These presume that the decree is ripe for execution as regards the relief given and claimed at such date. If it is not so ripe, the period will run from the date when it is so ripe. In the case noted in the margin, a decree of 14th December, 1892, provided (1) for possession of the mortgaged land for 20 years by the plaintiff mortgagee in satisfaction of the amount due on the mortgage, (2) for an annual cash payment by the defendant to the plaintiff, (3) in case of any default in such payment, for sale of the mortgaged land for satisfaction of the money debt, and (4) in case the sale proceeds be not sufficient, or there be an obstruction to the sale of the mortgaged land, for realisation of the money debt from the person and other property of the defendant. For default in payment of the cash allowance of 1893, a part of the mortgaged land was sold but the proceeds were insufficient to satisfy the money debt. Therefore, in 1908, the plaintiff again sought to sell the rest of the mortgaged land. The land was released on the objection of the Collector that it was an unsaleable *vatan*. On 19th December, 1910, the plaintiff sought to enforce the personal remedy in execution; and the limitation of 12 years imposed by section 48 was set up. The personal remedy arose only when the whole of the mortgaged property was sold or there arose an obstruction to its sale, which happened in this case in 1908. Hence the period was held to start from that time. The court did not consider the question whether the obstruction did not exist at the date of the decree.

Mahadev
Sakharam
Parkar
v.

Janu Namji
Hatile,
36 Bom., 373.

Symbolical possession delivered to auction purchaser, the judgment-debtor remaining in actual possession—Effect of, as to the starting point of the debtor's adverse possession.

This Full Bench case sets right the misconception prevalent as to symbolical or formal possession. Our Civil Procedure Code prescribes the cases in which formal or

symbolical possession is to be delivered, and it will be noticed these are all cases in which the judgment-debtor is out of possession of the property, which are provided for by article 137 of the Limitation Act. In other cases actual possession is to be delivered "if necessary, by removing any person bound by the decree who refuses to vacate the property." (*vide* Order 21, Rules 35, 36, 95, and 96). It is the duty of the decree-holder or auction purchaser to see that the law is complied with when the judgment-debtor is in possession, and to have actual possession delivered to him, and not to be content with the too frequent perfunctory mode of delivering possession by beat of drums, which is only delivery of formal possession. If he is careless, the judgment debtor's possession becomes adverse. The Calcutta, Bombay and the Allahabad High Courts had ruled that delivery of formal possession even where the judgment-debtor is in possession, gives a fresh starting point for the period of 12 years, *i. e.*, the case is taken out of article 138 and falls under article 144. This view is obviously wrong. The Code does not provide for delivery of formal possession at all in such a case, and there is no warranty for the assumption, which runs through these cases, that the possession of the judgment-debtor becomes adverse only from the date of formal possession. If that be so, the decree-holder or auction-purchaser may indefinitely prolong the period of limitation by not applying for the delivery of any sort of possession. It is submitted that the Full Bench view is the correct one.

Gift—Death of or revocation by donor before registration or completion of transfer.

These two cases require careful consideration. A wishing to make a gift of his property to B, writes or executes a document of transfer, with the consent of B, and before the document is registered, A dies or revokes the gift. The document is, however, registered compulsorily or otherwise. Is there a valid gift? Where the document is voluntarily registered by the legal representatives of the deceased donor as happened in 32 Bom., 441, 20 All., 392, 25 Mad., 672, there can be no real difficulty. But if the donor or his legal representative refuses to register, the Registration Act provides

Madonji
Devchand
v.
Tribhavan
Virchand,
36 Bom., 390.
and
Parbati
v.
Bajjnath,
9 A. L. J. R.,
300.

for compulsory registration if the fact of execution is proved. Being so registered, it becomes a registered document within the meaning of section 123 of the Transfer of Property Act, and the gift is valid. At least such is the reasoning of the Allahabad High Court in the case noted above. Analysed, it amounts to this that if A agrees to make a gift to B, and B accepts it, A can resile so long as he does not write out a deed of gift and sign it; but the moment he signs the deed, he has no *locus penitentiae* left in him. This it is submitted is wrong. A has a right to resile so long as he does not do every act necessary to complete the title of the donee. In the Bombay case, the owner of certain shares directed her agent to make a gift of them to her minor nephews, and directed that they should be transferred to T, the agent, and M as trustees for the minors. A transfer deed was accordingly written out and lodged with the company. The donor had died the day before, but the company duly registered the shares in the names of T and M as trustees for the minors. This was held to give a valid title to the minors. Death of the principal ended the authority of the agent to do anything further in the matter, and it is submitted that this case too has been wrongly decided.

Uncorroborated evidence of accomplice.

King-Emperor
v.

Nilakanta,
35 Mad., 247
and
Muthukumara-
swami Pillai,

v.
King-Emperor,
35 Mad., 397

These two Full Bench cases, the first decided by three Judges and the second by five, lay down the well-known rule that section 133 of the Evidence Act is the enactment relating to the evidence of accomplices and that illustration (b) to section 114 does not in any way modify it but simply lays down certain propositions intended to assist the courts in drawing inferences of fact. In other words, a court may convict on the uncorroborated testimony of an accomplice provided it finds it to be true; but before acting upon it the court should consider such testimony, always bearing in mind that it is tainted evidence, scrutinise it with the utmost care, accept it with the greatest caution, consider it in the light of the circumstances in which it is given and in the light of all other circumstances in the case, of which evidence

is legally admissible; and then if the Court believes it, it can act upon it, even if there is no corroboration in the strict sense of the term.

The rule so laid down is well known and worn threadbare; but the difficulty is in the application of it. With a highly trained judiciary, there would not be much danger of misapplication; but taking our Judges and Magistrates as they are, the matter is at least doubtful.

Limitation Act, section 31—Suit instituted on the 8th of August, 1910.

Section 31 of the Limitation Act confers a special period of two years from 7th August, 1908, for the institution of mortgage suits. The last day of this period of two years expired on 7th August, 1910, which was a Sunday. Many mortgage suits were filed on the 8th of August, and the question was whether they were filed within the period of two years. The provisions pertinent to the matter are those contained in section 4 of the Limitation Act and section 10 of the General Clauses Act. A Division Bench of the Bombay High Court has ruled that neither section applies and the suits are barred, *Shevdas Daulat Ram v. Narayan*, 36 Bom., 268. A cursory perusal of this judgment will show that it was not well considered. The Allahabad High Court in the marginally noted case ruled that both the sections applied and saved the suits from the bar of limitation. The Oudh Court in *Rahmatul Fatima v. Ashraf*, 15 Ind. Ca., 439, ruled to the same effect. It held that section 4 should not apply, but the first part of section 10 of the General Clauses Act did. As regards the proviso to that section it argued that from 7th August, 1908, to 31st January, 1908, the Limitation Act of 1877 and section 31 of the Limitation Act of 1908, were both in force, and so the former did not apply to cases under the latter.

Hira Singh

v.
Musammat
Amarthe,
34 All., 375.

Limitation Act, articles 181 and 182, and section 15—Sale stopped by injunction.

This case raises an important question. A, in execution of a money decree, attaches a house of his judgment-debtor, B. C objects and prefers a suit under Order 21, Rule 63 and obtains an order suspending the sale. The suit is decided

Ghulam Nasir-
ud-din

v.
Hardeo Prasad
34 All., 436.

in C's favour. A then applies for execution in respect of other properties of B. This application is more than 3 years from the last application, and is time-barred, unless the period of the currency of the injunction be excluded. In *Basant Lal v. Batul Bibi*, 6 All., 23, the court on general principles held that the second application might be considered as one to revive the previous application. In the present case, the court held that since execution of the decree was stayed by injunction, section 15 of the Limitation Act applied. With due respect it is submitted that, both views are wrong. The application could not be considered one to revive the previous application, because the properties sought to be proceeded against were different. Nor can stay of sale of a particular property be considered as stay of *execution of the decree*.

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SOME QUESTIONS ARISING OUT OF THE PRIVY
COUNCIL DECISION IN BALWANT SINGH *versus*

MAHARAJ SINGH.

The decision of the Privy Council in the above case has been received with mixed feelings in this country. The case bristled with legal questions of momentous importance and it was expected that the pronouncement of the final court of appeal would set at rest those vexed questions in the interest of the profession and of the litigant. But the result has been one of bitter, nay, cruel, disappointment. Out of the several important issues involved in this case, the one respecting the minority of the contracting party to the deed of mortgage, has received the final corroborative seal of the highest tribunal in the land that such a contract is absolutely void. It is void and unenforcible even if it were of an executory nature by way of specific performance. See 9 A. L. J. R., 33, P. C. That being settled, can we say the same thing in respect of the other very important principle of Hindu law that arose out of that case, namely, whether it is in the power of the *quondam* minor son, that is, who had been minor when he executed the mortgage, to save his interest in the joint property if the debt of mortgage had included debts and obligations of his father which he would be bound to pay? I do not raise any controversy respecting the sinful or the immoral debts of the deceased father. That point has long been set at rest: and even the common laymen of the country,—to say nothing of Lawyers and Judges, are fully conversant with the views of law and of courts on the subject. But if the father's debts were otherwise, and there was a call on the pious obligation of the sons, adult or minor, to answer

for them, are we now to understand that if for such, among other debts the adult co-parcener executes a mortgage, charging joint family properties, and secures the signature, fruitless it may be, of a younger member, a minor, in order to evidence his execution or concurrence, the latter is not personally liable, and that his interest in the joint estate is also free?

To the questions formulated above, the decision of the Judicial Committee, fails to give any printed or decisive answer. The result of this will give rise to very serious misconceptions for the decision of the point arising anywhere in India. It is bound to be a very common occurrence in cases before the courts in this country, that upon the death of the father, leaving debts to pay, and sons, some of whom may be minors, either the adult and competent sons themselves, or they in conjunction with their minor brother or brothers, may execute a mortgage to discharge the debts, or to avert impending sales of properties in execution of decrees against the deceased father, would the fact of minority alone of some of the obligors make any difference in the decision? That is to say, if the mortgage-deed were executed by the adult sons only,—either “as managers or even as members of the joint Hindu family,”—see page 521, bottom, will the decision of the case based on the mortgage be one way; but if the said adult sons were to invite their young brother, about to arrive at the age of maturity, to join, in the transaction and to put his signature to the deed as an executant, will the decision of the suit on foot of the mortgage be of a different nature? The Privy Council decision, now being considered, appears to lay down that in the latter case the *quondam* minor and his interest would be wholly exonerated from the claim, without at the same time saying whether the result would have been the same if the adult sons were the only obligors in the deed of mortgage. Let us suppose that by implication no differences in the results have been intended to be prescribed;—namely, that in either case the interest of the minor son,—minor at the time of the mortgage, but quite adult at the time of the suit, as in the case before us, would be free, will that view be sound, or will it fly in the very face of the common sense of the people in this country, and of the Bench, and of the Bar?

It is, to my mind, absolutely immaterial and quite beside the mark that Sheoraj Singh paraded with an assumed title of *Raja* as the prefix, and of *Bahadur* as the suffix to his name. Similarly, it does not matter in the least, as likely to effect the merits of the case one way or the other, that the self-constituted *Raja Bahadur* assumed the false garb as the owner of the state as his impartible *raj*. The judicial eye, looking beneath his assumed feathers, discerned,—that it was an ordinary joint estate belonging to Sheoraj Singh and his brother, Maharaj Singh, in which both the brothers and their deceased father, Raja Shanker Singh Bahadur, had their vested interests by birth. In a way, one may be inclined to think, Sheoraj Singh by posing as the sole owner of the estate advanced to the Bank of Upper India, Limited, a status superior to that of a manager to the estate; otherwise, beneath the cloak, he certainly did figure as a member of the co-parcenary, and one of the sons of the deceased Raja. If the view of the law be that when one co-parcener, calling the whole estate as his own exclusively, alienates it for valid and necessary family purposes, he shall be deemed to have passed only his own share or interest therein, it being admitted or found that the property is joint with others, then the matter would stand on a different footing. The Lords of the Privy Council have not at least said so: and probably none of your readers would concede that the above is a sound proposition of law. If this were so, the appellant's Counsel contended before the Privy Council that the consideration for the mortgage had gone, to wipe off the debts of and the decrees against the father, that the appellant Bank had received no notice that the money was being borrowed to discharge immoral debts (per Lord ROBSON, see page 515 bottom), that some at all events of the debts were contracted by the brothers after their father's death, and that the High Court, having dismissed the whole suit, have not given any relief in respect of any of those debts. The proceedings, however, showed that the court below,—High Court of Allahabad,—differing from the court of first instance, upon the consideration of the evidence on the question as to the nature of the debt, came to find that the debts secured by the mortgage in suit were not such debts for which Maharaj Singh could be held

liable. We have it from the mouth of Sir JOHN EDGE, late Chief Justice of Allahabad High Court, who pronounced the opinion of the Judicial Committee how reluctantly and in a perfunctory manner the "enquiry into the origin and nature of the debts" in suit was made. It was deemed irrelevant to start with. But it was feared that the question might become material in the opinion of the Court of Appeal, that is, the Privy Council, the evidence was considered, and the seal of immorality was impressed on the transactions. As a matter of fact, the question did become material in appeal; and counsel for the appellant strenuously argued that the debts, or at all events, a large portion of them, were above-board and untainted. It is conceivable that the conclusion of the court below, being a finding on a question of fact on appeal, was not considered fit to be re-opened by the Privy Council. But why has that not been said?—and why, because the claim was for over 3 lakhs of rupees and likely to go up in appeal to the Privy Council, was it said that, however reluctant the Judges might be to take the trouble to consider and to discuss the point in first appeal before them, a finding should be given, because it might be regarded as a relevant and a material point for consideration by the court of Higher Appeal?—and why, again, as the Privy Council often do, was the minute analytical reconsideration deemed necessary to find the age of Maharaj Singh when the mortgage in suit had been executed?

The purpose of the present article is to evoke discussion,—whether in a case of this sort it is or it is not a material enquiry to find the origin and the nature of the debt of mortgage for which a co-parcener purports to bind the joint estate, when the other co-parcener is a minor, and therefore incapable of incurring debts or entering into a contract for any previous debts of the family including those of his father. The mortgagor-co-parcener may, in the recital in the deed, or in any other way, represent to the creditor that he is the acquirer or the exclusive owner of the estate, or he may set up his right as the manager of the estate; or he may make no pretension of any sort, and, in a plain outspoken manner, describing himself as a co-parcener, and setting forth the purposes of the loan, he may execute the mortgage binding the whole interest in a co-parcenary estate. The question may still

arise whether the obligation incurred will bind the estate, or only the interest or the share of the obligor. For that purpose, it is plain, that the enquiry was sought for in this case as to whether the obligation included in whole or in part the ancestral debt binding on the family. The alternative case set up by the Bank aimed to raise that enquiry : and this was the other issue stated by their Lordships at the opening of their decision, see para. 2, page 519. The judgment was abruptly closed after discussing the evidence, and recording the finding, on the issue as to the age of Maharaj Singh on the 28th October, 1892 ; and it was not considered by their Lordships necessary to decide any other issue. And that other issue that remained was whether the origin and the nature of the debt, in whole or in part, were such as to bind the interest of Maharaj Singh in the property that was mortgaged.

As a precedent on the question of alienation of joint family property by a single, or some of the co-parceners, wherein the interest of a minor,—or for the matter, of any other co-parcener is involved, this ruling of the Privy Council will have far-reaching consequences. If the alienating co-parcener or co-parceners do not in so many words declare or pretend to act as manager or managers, or as member or members of a co-parcenary ; and if they pose as the full owner or owners of the estate, it would appear, on the analogy of the aforesaid Privy Council case, that the obligee or the alienee would not be entitled to set up an alternative case, should any other co-parcener appear on the field, to implead him, and to assert that the obligation had been for legal necessity, or gone to benefit the joint family. According to the decision such a plea or issue would be unnecessary ; and the obligee would be bound to content himself with the interest of his obligors alone. As such cases are common enough, it is very necessary that the principle of the aforesaid Privy Council case should be threshed out and discussed in this country in order that the scope of the Ruling may be properly appreciated, either for being distinguished, considered a fit one to be followed, or otherwise.

HARI DAS CHATTERJEE,

Pleader, Indore.

CASES AND COMMENTS.

INDIAN.

Kattamoody
v.Kattamoody.
23 M. L. J.,
363.*Hindu law—Widow—Alienation with consent of reversioner for consideration or no consideration—Estoppel.*

An alienation made by a Hindu widow is the apple of discord in Hindu law. So long as she holds the estate she represents it fully; she is not a trustee for the next heir. A decree obtained against her in a fairly contested suit is effective against the next heir. But still her powers are hedged round with restrictions. She cannot alienate the estate except for such purposes as are sanctioned by the Hindu law or for legal necessity. Besides these two grounds, there is a third ground on which an alienation made by a widow which would not otherwise be legitimate may be supported, namely, the consent of her husband's kindred. Those kindred include such persons as are likely to be interested in disputing the transaction. The principle is quite clear, and that is that such consent is evidence of the propriety, if not the necessity, of the transaction. The question is as to the *quantum* of that consent. An early Full Bench of the Allahabad High Court required such consent to be "of all those among his kindred who can reasonably be regarded as having an interest in questioning the transaction".⁽¹⁾ The Calcutta High Court, however, in one of its earlier decisions refused to act upon the principle laid down by the Allahabad High Court and considered that "any alienation which the widow and the next heir may agree to make" was a good one. This view was a little modified in the later case of *Radha Shyam v. Joy Ram*⁽²⁾, in which it was explained that the requisite consent should be of the whole body of persons constituting the next reversion. This is the view that has found acceptance with the Privy Council, and the Allahabad decision stands expressly overruled on this point. [*Bajrangi v. Manokar-*

(1) *Ramphal v. Tula Kuari*, I. L. R., 6 All., 116.

(2) I. L. R., 17 Cal., 896

nika⁽¹⁾]. While we have reached a point of practical certainty, still there are many other points as to which the Privy Council decision itself has opened the flood gates of controversy. For example, whether a gift made by a Hindu widow to which the assent of the next reversioner has been obtained is one which can be maintained. The High Courts of Allahabad and Bombay have answered the question in the negative. [See *Abdulla v. Ramlal*⁽²⁾, and *Pilu bin Apa Nalvade v. Babaji bin Nam Mang*⁽³⁾]. Another question which has been raised is whether a surrender by the widow of a part only and not of the whole estate is good. The Bombay case last mentioned holds that the widow cannot surrender partially. Now, in the case marginally noted what had happened was that the widow of the last owner adopted a son. The next reversioner sued to set aside that adoption and succeeded. After this two documents came into existence, one was by the reversioner in favour of the widow whereby the reversioner relinquished the estate to the widow and another by which the widow settled a house and some cultivated land on the adopted son. In this state of the facts the question arose whether the reversioner was or was not estopped by reason of his executing the first document from disputing the validity of the alienation in favour of the adopted son. SUNDARA AIYAR, J., rested his decision on this ground, and upheld the alienation, but SADASIVA AIYAR, J., based his decision upon two grounds which run counter to the decisions arrived at by the Allahabad and the Bombay High Courts. SUNDARA AIYAR, J., also does not dissent from the view taken by his colleague. We shall now take up the point whether the distinction sought to be made between a transfer for consideration and one for which there is none is one which is warranted by the decision of the Privy Council ruling in *Bajrang's* case. It is respectfully submitted that the decision of the Privy Council is not open to the construction which has been sought to be put upon it in the Allahabad and the Bombay cases. It appears to us that the Privy Council divides alienations made by a widow into three classes: (i) alienations for religious

(1) I. L. R., 30 All., 1.

(2) I. L. R., 34 All., 129.

(3) I. L. R., 34 Bom., 165.

or charitable purposes; (ii) alienations for secular purposes in which, to use the words of *PONTREX*, J., the touchstone is necessity; and (iii) alienations which otherwise would not be legitimate, but may become so if made with the consent of the husband's kindred. The word *otherwise* in this connexion is important, for the Privy Council take particular care to distinguish this class of alienations from either of the two others, that is to say, the alienations of the third class are neither for religious or charitable purposes nor for legal necessity. But they are founded upon the consent of those who may be vitally interested in the estate. Referring to *Ramphal Rai's* case their Lordships observe: "The High Court of Allahabad, indeed, does not recognise the validity of surrenders in favour, or alienations made with the consent, of presumptive reversioners, so as to defeat the title of the actual reversioners at the time of the widow's death. But this restriction is at variance with the principle itself, and is not in accordance with the practice in other parts of India in which the *Mitakshara* law prevails.....And though, they would be unwilling to extend the widow's power of alienation beyond its present limits, they cannot adopt the further limitation which the Allahabad High Court has sought to establish." These words leave no doubt whatever upon our mind that the Privy Council overrules the Allahabad case, and that the law is settled that surrenders in favour of or alienations with the consent of presumptive reversioners are valid. If that is so, then what warrant is there for drawing the distinction suggested? The judges of the Madras High Court in *Kuppier v. Chinnasamier*⁽¹⁾ declined to act upon this distinction, and one of the judges at least in the case under review has concurred with them. In our opinion the Madras judges are quite correct, and the limitation put upon the construction of the ruling of the Privy Council is not supported by any principle. The *ratio decidendi* of *Vinayak v. Govind*⁽²⁾ is that apart from necessity the consent of the next reversioners will support an alienation by a Hindu widow, and it is not a fair inference to deduce from some observations there that the consent of reversioners will validate only an alienation for consideration.

(1) 22 M. L. J., 488.

(2) I. L. R., 25 Bom., 129

Again let us take a case like this. The widow surrenders her estate to the next reversioner. The latter consents to the former bestowing upon her own relation a portion of the estate. This is done by means of a registered award to which both the widow and the next reversioner are parties. Is there any objection to such an alienation? The Allahabad High Court places this upon the footing of a gift and thus obnoxious to the objection formulated above. We respectfully submit that the transaction amounts to a relinquishment of the estate to the reversioner which vests an absolute estate in him and a re-transfer to the widow by the reversioner of a portion of the estate in absolute right so that she is competent to alienate it to whomsoever she likes. And there can be no valid objection to such a course.

In *Pilu's* case the Bombay judges have held that a surrender of a portion of the life-estate in favour of the next reversioner is not good. The Madras High Court in *Rangappa v. Kamti*⁽¹⁾ holds that a partial surrender is competent, and the Calcutta High Court has held the same.⁽²⁾ The observations of SADASIYA AIYAR, J., seem to lend countenance to the same view, inasmuch as he holds that the Full Bench decision in *Jhaduramuthu v. Srinivasa*⁽³⁾ has in effect been overruled by the Privy Council decision in *Bajrang's* case. That, however, is a moot question, and as the question does not directly arise, we hold our opinion in abeyance.

Transfer of Property Act, section 59—"Attested", meaning of.

A executes a mortgage-deed in favour of *B* to secure a loan of upwards of Rs. 100. Of the two attesting witnesses one signs upon the acknowledgment of execution made by the executant. *Held* that the document was invalid as not being properly attested.

Shamu Patter
v.
Abdul Kadir
10 A. L. J., 259.

The decision in the principal case sets at rest a great deal of conflict upon an important point. What is the meaning of the term "attest"? In Wharton's *Law Lexicon* it is said to connote the signing by a witness to the signature of another of a statement that a document was signed in the presence of the witness. And this meaning has been consistently

(1) I. L. R., 31 Mad., 366.

(2) *Kamuran v. Kashi*, 14 C. W. N., 226.

(3) ?

assigned to it in a series of cases in England. In India, however, the question became somewhat clouded by reason of differences of opinion in the different High Courts. It is now happily settled by the Privy Council, and though we are conscious that some hardship will result when the case of *pardanashin* woman is under consideration all we can wish is that the legislature would remove that hardship by making due provision for such a case. It was only to be regretted that such divergence could have arisen in India in view of the fact that whenever the legislature had thought that an attestation upon mere acknowledgment would suffice it took care to expressly mention so. For our part we can find no justification for importing into one statute provisions of other statutes which have been passed for different objects. Each code must be deemed to be exhaustive for its own purposes unless otherwise provided.

The Panjab
National Bank,
Limited
v.
The Mercantile
& Bank of India,
Limited.
I.L.R., 36 Bom.
455.

Banker and customer—Effect of a blank draft which is not addressed to any specific banker—Negligence of customer—Effect of negligence—Proximate cause.

In the case marginally noted an important question as to banker and customer has been decided by the Bombay High Court. What is the effect of carelessness on the part of customer whereby the banker is led to cash a forged draft, there being no intention on the part of the former that the draft shall be used? The Bombay judges held that there being no *animus emittendi* the customer is not estopped from denying that that draft is his own. This conclusion is reached from the following facts. The plaintiffs and the defendants are banking corporations, respectively carrying on business at Lahore and Bombay. In November, 1904, the plaintiffs became the customers of the defendants. In April, 1904, the manager of the former at Lahore left two blank forms, one a draft and another a letter of advice, ready signed but in other respects incomplete, *in order that they might be used as occasion would require during his temporary absence.* When the manager returned he neglected to take back and destroy the blank forms, and they were afterwards dishonestly abstracted and used with the result that the defendants debited the plaintiffs with a large sum of money which had been drawn upon them by means of the forged

cheque. That there was some carelessness on the part of the manager is evident from the fact that he let the blank forms remain in the possession of his subordinate official without being destroyed, but at the same time it is to be borne in mind that he never could have anticipated this act of forgery on the part of his subordinate on the ground that persons are not supposed to commit forgery, and the protection afforded is by the law and not the vigilance of the parties in excluding the possibility of committing it. *Societe Generale v. The Metropolitan Bank*⁽¹⁾. Consequently unless the negligence should have occurred in the very transaction itself, not in some collateral act, and it were the proximate cause of misleading the defendant, the principle that of two innocent parties the one who by his negligence caused the loss to ensue should suffer would not apply⁽²⁾. It was held, therefore, that the after-occurring forgery was not the direct result whereby the defendants were induced to part with the money in question. The case in its facts resembles *Smith v. Prosser*⁽³⁾, in which the facts were that the defendant, returning to England from South Africa, left a blank signed promissory note with his agent with the direction that the latter should not negotiate it without communication from the defendant to that effect. The agent, becoming false to his trust, negotiated the note fraudulently for his own purposes. The defendant was not held to be liable. In the case under review the draft had been cashed by means of two offences, namely, theft at first and then forgery, none of which it was humanly possible for the manager to suppose would occur. The judgments will be an informing study.

Civil Procedure Code, Order 43, Rule 1—Application to set aside execution sale on the ground of fraud—Order of remand passed since the passing of the new Code—Appeal.

Benod Behari
Bhadra,
v.
Ram Sarup
Chamar.
16 C. W. N.,
1015

In this case we fail to understand the decision of the learned judges that no appeal lies. In execution of a decree a sale took place on September 17th, 1900. An application made to set aside the sale on the ground of fraud and material irregularity in publishing and conducting. It was made on July 23rd, 1907, and was allowed by the first court on July 6th,

(1) 27 L. T., 849, 856.

(2) *Lickbarrow v. Mason*, 2 T. R., 63.

(3) [1907] 2 K. B., 735.

1908. The appellate court set aside this order and remanded the case on November 6th, 1908. Upon remand the application was dismissed on June 12th, 1909. There was an appeal to the court below and the order was reversed, the case being once again remanded on January 29th, 1910. There was an appeal against this order. The judges relying upon section 154 of the Code of Civil Procedure, 1908, held that the appeal was incompetent. Whatever the expression 'present right' in section 154 may mean or whether that section limits the operation of clause (6) of section 6 of the General Clauses Act and cuts down a right of appeal already vested are questions on which we express no opinion. But it appears to us that the decision should have been the other way in view of Order 43, Rule 1 (u), as an appeal is expressly given from an order of remand.

NOTES AND CUTTINGS.

HOW THEY RAN.

Malachi Casey was in court as a witness, and with each succeeding question put to him his never brilliant mental powers became more and more confused. At last he was asked to tell about the situation of a certain flight of stairs.

"How do those stairs run?" asked the examining counsel, whose patience was well nigh exhausted by his efforts to elicit information from Malachi.

"Phwat is it you're askin' me now?" repeated Malachi, bewildered.

"I asked you how those stairs run?" repeated the counsel, with great distinctness of enunciation.

"Thim stairs!" muttered Malachi, evidently cursed with doubt. Suddenly his stupid face brightened. "Why, sor," he said, with his eyes fixed on the counsel, whose gaze he felt sure would now be approving, "If wan is at the fut of thim stairs, they run up; but stand at the top of thim an' they run down, sor!"—*The Green Bag*.

A remarkably brief and effective summing up was once quoted by Lord James in an afternoon speech.

It was delivered by an Irish judge trying a man for pig stealing. The evidence of his guilt was conclusive, but the

prisoner insisted on calling a number of witnesses, who testified most emphatically to his general good character.

After hearing their evidence and the counsel's speeches, the judge remarked : "Gentlemen of the jury, I think that the only conclusion you can arrive at is that the pig was stolen by the prisoner, and that he is the most amiable man in the county."

—*London Chronicle.*

GETTING AT THE FACTS.

A lawyer in a Southern court was examining a witness as matter-of-fact as himself. A fence was in some way connected with the case. The lawyer wished to impress upon the court and jury that the witness was perfectly familiar with that particular fence, and was, therefore, competent to speak of its condition. To that end he asked :

"Do you, or do you not, know the fence between the farms of Anthony Barker and Henry Morgan ?"

"I do, sir."

"And have you at any time crawled under that fence ?"

"Never, sir."

"Never ?"

"Never, sir."

"Well, then, can you or can you not recall ever having crawled through that fence ?"

"I cannot, sir."

"Perhaps you may be able to state positively whether you have or have not climbed over that fence."

"I have, sir."

"Now, remembering that you are under oath, you will state definitely to the court and jury precisely what part of that fence you climbed over."

"The top, sir."

—*The Green Bag.*

HIS AUTHORITY.

At the trial of a cause before a justice of the peace in a Southern state, a decidedly novel legal authority was cited by one of the learned counsel, a citation which wrought some slight confusion in the court-room.

"The Court will please observe," remarked this acute counsel, with much deliberation and in a most pompous manner, "that in the case of *Shylock v. Antonio*, although judgment was rendered in favour of the plaintiff, yet circumstances prevented the execution which had issued from being carried into effect, in spite of that fact."

"To what cause," inquired the justice, with a face overspread with perplexity, "did the Court understand the gentleman to refer?"

"*Shylock v. Antonio*, 2nd Shakspeare, page 235, Johnson's edition," returned the counsel, solemnly. "The Court will there find the case reported in full."

The Court unfortunately did not, upon reflection, consider the authority quoted as quite sufficient.—*The Green Bag*.

Magistrate.—"What is the charge against this old man?"

Officer.—"Stealing some brimstone, your Honour. He was caught in the act."

Magistrate (to prisoner).—"My aged friend, couldn't you have waited a few years longer?"—*Chicago Tribune*.

SPECIFIC PERFORMANCE WITH ABATEMENT OF PURCHASE PRICE.—It is settled, as a general principle in equity, that where a vendor of land is unable to make a perfect title to all the land he has contracted to convey, the purchaser is entitled to a conveyance of such interests as the vendor may have, with an abatement of the purchase price proportionate to the deficiency. It has been suggested as an explanation of this doctrine that the vendor, having asserted a title to the entirety, is now estopped to deny it. But the decree cannot logically be based upon the assumption that the interest of the vendor is the entirety of the subject matter called for by the contract, since an abatement of the purchase money is allowed. It should be recognized that the court is, in fact, executing a contract the parties never made. The justification lies in the great hardship upon a purchaser if he is left to his remedy at law, and the comparatively slight hardship upon the vendor in compelling him to convey part of that which he has contracted to convey for a compensation

on approximately the basis contracted for by the parties. And it is conceived that the reason why the doctrine is not applied where the purchaser in contracting was aware of the defect is not that his knowledge defeats an estoppel, but that there is less hardship in denying this extraordinary relief to a purchaser with knowledge of the hazard attending the vendor's ability to perform, than to a purchaser without such knowledge. And so although the defect is known, where the vendor assures the purchaser of his ability to procure from a third person the concurrence necessary to a perfect title, the balance is in the purchaser's favour. The authorities do not limit the application of the doctrine to cases where the deficiency is not very great. Where, however, the value of the part the vendor is unable to convey is purely conjectural, such relief would mean not only the execution of a new contract, but compensation at a rate substantially different from that fixed by the parties, and is accordingly denied.

A phase of this question which has given much difficulty arises where the vendor's wife refuses to release her right to dower. Several courts have treated this as a case for specific performance with an abatement or indemnity. The purchaser has been protected in various ways. He has been allowed to retain or to have set aside a sufficient portion of the purchase money as an indemnity. Other courts deduct from the purchase money the present cash value of the inchoate right to dower. The Wisconsin court adopted this view in a recent case. *O'Malley v. Miller*, 134 N. W., 840. By a view which has considerable support, and which, it is submitted, is most consonant with reason, the purchaser is denied specific performance with an abatement or indemnity except where the wife's refusal is procured by the husband, on the ground that in a given case the value of the dower right is purely conjectural; and that such relief necessitates a departure from the bargain entered into by the parties so great as to work an undue hardship on the vendor.—*Harvard Law Review*.

PRIORITY OF ASSIGNEES UNDER SUCCESSIVE ASSIGNMENT OF EQUITABLE INTEREST—If the beneficiary of a

trust fund assigns his interest to A for value and A gives no notice of the assignment to the trustee; and later the beneficiary purports to assign the same interest to B, who, having no notice of the previous assignment, gives value and notifies the trustee of the transaction, which party is entitled to the fund in the hands of the trustee? The English cases give the second assignee the priority. New Jersey has recently adopted the English rule. *Jenkinson v. New York Finance Co.*, 82 Atl., 36 (N. J.)

When A sells a chattel to B and then later purports to sell the same chattel to an innocent purchaser, the purchaser does not get the chattel, for A has no longer any chattel to sell. But when *Dearle v. Hall*, the leading English case on successive assignments of equitable interests, was decided, the rule of law in England was that if A still had the chattel in his possession, and delivered it to the innocent second purchaser, the purchaser could keep the chattel. In an earlier case, moreover, much relied on in *Dearle v. Hall*, it had been decided under the bankruptcy statute that a chose in action was a chattel, and was in the "possession, order and disposition" of the bankrupt so as to pass to his trustees in bankruptcy unless a former assignee had given notice to the debtor. In both the above cases, the first sale or assignment passed everything that the seller had, and the buyer or assignee was required to do nothing more to complete his title. It was simply because the seller retained possession of the thing sold that a second *bona fide* purchaser was protected. So it was not unnatural that in the case of an equitable interest, equity followed the existing law, and if the assignor could be said to retain possession over the equitable interest, then a second assignee who obtained possession would be protected. Where there are evidences of an equitable interest or a chose in action, as a bond or an insurance policy, it would seem that if the first assignee took possession of them he should be protected. Where such is not the case the nearest approach to taking possession is notification to the trustee or debtor of the assignment.

Shortly after *Dearle v. Hall* was decided, the English law as to the fraudulent retention of possession of a chattel

by the seller was put on a sounder basis, and to-day the better rule seems to be that it is only evidence of fraud. So if equity had continued to follow the analogy of the law the better rule to-day would perhaps make failure on the part of the first assignee to give notice to the debtor or trustee merely evidence of fraud. But the principal case is in line with the present tendency of decisions in this country. To contend, as the principal case does, that the first assignee has been negligent and so is not entitled to priority would seem to beg the question. It is, however, true that modern business deals largely and freely with equitable interests and chases in action. And it tends, perhaps, to a fairer dealing with such interests to have as an unvarying rule that retention of possession by the assignor is "conclusive evidence" of fraud.—*Harvard Law Review*.

RECOVERY OF MONEY LOANED TO PERSON HAVING NO LEGAL CAPACITY TO CONTRACT.—By the early English law, a person lending money to another who was under a disability had no legal remedy. But in equity the fiction developed that if money was advanced to an infant, an unsupported wife, or a lunatic, and was in fact spent for necessities, the lender occupied the place of the tradesman who supplied them. This theory of "subrogation" was recognized by text writers and was applied in several decisions in this country. It was even expanded to cover the analogous case of corporations borrowing *ultra vires* and expending the proceeds in paying their legal liabilities. But lately the theory has fallen into disrepute, and in England its application to corporations borrowing *ultra vires* has been flatly denied. It seems strange, therefore, that a recent English decision in a case in which the lender sought to recover money advanced to a lunatic and used for necessities should have not only adopted the theory but carried it to its logical extreme. *In re Beavan*, [1912] 1 Ch., 196. Although the lending bank was denied all compensation for its services, yet it was actually permitted to recover interest where the claims of the creditors to which it was thus subrogated were interest bearing.

That a person lending money to another who is under a disability should have some means of recovering his advances, seems obvious, for otherwise incapacitated people might suffer severe deprivation though possessed of considerable resources, for want of credit to enable them to supply their immediate needs. But the remedy by subrogation, besides being fictitious and circuitous, has two marked defects. If the borrower pays cash for his necessities, no debt arises to which the lender can be subrogated; yet surely he is just as worthy of relief. If the borrower becomes insolvent, and the lender happens to be subrogated to the rights of secured creditors, he receives a wholly undeserved priority. It would seem wiser, therefore, to base the lender's right to recover on quasi-contractual principles, and argue that the borrower has been enriched and has a duty to reimburse the person to whom this enrichment is due. In analogous cases, a surety on an infant's note for necessities who has paid the debt, and one who has paid a debt for necessities at the infant's request, may recover in assumpsit. If the lender's recovery is limited to money actually spent for necessities, it can make no substantial difference to the borrower whether his liability be for money borrowed or for the price of the necessities; and the objection on which the early decisions rest, that the lender might encourage the borrower to squander his funds, ceases to apply. Since, moreover, the obligation to repay is raised by the law regardless of any contractual relation, the technical argument of the old cases that a contract, void when made, cannot later become binding simply because the money is spent for necessities, has no force.—*Harvard Law Review*.

AGENCY—NATURE AND INCIDENTS OF RELATION—
FATHER'S LIABILITY FOR TORTS OF SON.—The plaintiff was injured by the defendant's automobile, due to its negligent operation by the defendant's minor son. The son was using the car on a pleasure trip of his own without his father's knowledge but pursuant to a general permission to use it. *Held*, that the defendant is liable. *Stowe v. Morris*, 144 S. W., 52 (Ky.).

The court reasons that the son was the general agent of his father, because the machine was bought for the family pleasure and he was deriving pleasure from its operation. The act of driving the car plus the purpose for which it was bought is thus made to determine the agency. The important question should be whether the son was using the machine for his own purposes. Though the father may derive some incidental benefit by his son's pleasure, it is an argument more fictitious than real to say that the son becomes his father's agent to supply himself with pleasure. It is a mere evasion of the rule that a parent is not liable for the torts of his child. *Kumba v. Gilham*, 103 Wis., 312, 79 N. W., 325; *Chastain v. Johns*, 120 Ga., 977, 48 S. E., 343. Where the son has a general permission to drive the family horse, the father has been held not liable. *Maddox v. Brown*, 71 Me., 432. And it has become well settled that an automobile is not *per se* a dangerous machine. *Daily v. Maxwell*, 152 Mo. App., 415, 133 S. W., 351; *Cunningham v. Castle*, 127 N. Y. App. Div., 580, 111 N. Y. Supp., 1057. On facts similar to those of the principal case the opposite result has been reached. *Doran v. Thomsen*, 76 N. J. L., 754, 71 Atl., 296; *Maher v. Benedict*, 123 N. Y. App. Div., 579, 108 N. Y. Supp., 228. *Contra*, *Daily v. Maxwell*, *supra*.—*Harvard Law Review*.

CONTRACTS—SUITS BY THIRD PERSONS NOT PARTIES TO CONTRACT—ACTION BY PEDESTRIAN AGAINST STREET RAILWAY FOR BREACH OF ITS CONTRACT WITH CITY TO KEEP SIDEWALKS IN REPAIR.—A street railway company agreed to keep a sidewalk in repair as one of the terms upon which the city granted the use of a street. The sidewalk became out of repair, in consequence of which the plaintiff was injured. *Held*, that she can recover damages from the company. *Jenree v. Metropolitan Street Ry. Co.*, 121 Pac., 510 (Kan).

Even in jurisdictions which permit a beneficiary to sue upon a contract, it is held that the contract must be primarily intended for his benefit. *New Orleans St. Joseph's Association v. Magnier*, 16 La. Ann., 338. But if the beneficiary has a legal or equitable claim against the promisee for the advantage

which the promisor has agreed to confer, no such primary intent is necessary. *Lawrence v. Fox*, 20 N. Y., 268. A city owes no duty to its citizens to maintain a given water pressure. *Van Horn v. City of Des Moines*, 63 Ia., 448, 19 N. W., 293; *Wright v. City Council of Augusta*, 78 Ga., 241. So the fact that a house-holder is incidentally benefited by a contract between a water company and the city is held insufficient to permit recovery for losses due to the company's failure to maintain the agreed pressure. *Mott v. Cherryvale Water & Mfg. Co.*, 48 Kan., 12, 28 Pac., 989; *Becker v. Keokuk Waterworks*, 79 Ia., 419, 44 N. W., 694. *Contra*, *Gorrell v. Greensboro Water Supply Co.*, 124 N. C., 328, 32 S. E., 720. Some recent cases regard maintenance of pressure as within the public duty of a water company. *Guardian Trust & Deposit Co. v. Fisher*, 200 U. S., 57, 26 Sup. Ct., 186; *Mugge v. Tampa Waterworks Co.*, 52 Fla., 371, 42 So., 81. But as repairing a sidewalk is obviously not within a street railway's public calling, and as there is no evidence of misfeasance, the decision in the principal case can be sustained only on a beneficiary theory. As the city owes a legal duty to each pedestrian to keep the highway in repair, the case properly falls into the class where intent to benefit the beneficiary is immaterial. See *City of Brooklyn v. Brooklyn City R. Co.*, 47 N. Y., 475, 485; *McMahon v. Second Avenue R. Co.*, 75 N. Y., 231, 237.—*Harvard Law Review*.

TRUSTS—FOLLOWING TRUST PROPERTY—CESTUI'S RIGHTS WHEN TRUSTEE BUYS PROPERTY PARTLY WITH TRUST FUNDS.—The plaintiff gave her husband money to be used in part payment of the purchase price of land, there being an agreement that title was to be taken in the plaintiff. The husband took the title in his own name and incurred debts after the purchase. *Held*, that the plaintiff is not entitled to payment out of the proceeds of the land as against her husband's creditors. *Miller v. McLin*, 143 S. W., 1008 (Ky.).

Where a wife provides the entire purchase price of land to which her husband takes title, he holds it in trust for her. *Wright v. Wright*, 242 Ill., 71, 89 N. E., 789. When trust funds are mixed with the trustee's own money, and invested

in a *res*, the decisions vary regarding the *cestui's* rights. The prevailing view is that there is, as against general creditors, a trust of an undivided share in the proportion in which the trust money contributed to the purchase. *Faylor v. Faylor*, 136 Cal., 92, 68 Pac., 482; *Mayer v. Kane*, 69 N. J. Eq., 733, 61 Atl., 374. Some states allow this only when the *cestui* stipulated for a distinct interest in the *res*. *Leary v. Corvin*, 181 N. Y., 222, 73 N. E., 984; *McGowan v. McGowan*, 14 Gray (Mass.), 119. The cases are numerous to the effect that when the mixed fund is deposited in a bank to the trustee's account, the *cestui* has an equitable charge on the *res* before the general creditors receive anything. *In re Hallett's Estate*, 13 Ch. D., 696; *National Bank v. Insurance Co.*, 104 U. S., 54; *City of Lincoln v. Morrison*, 64 Neb., 822, 90 N. W., 905. This view has been reached in some states only when the trust property can be traced into some specific *res*. *Lowe v. Jones*, 192 Mass., 94, 78 N. E., 402. But since the trustee should not be allowed to make any profit from manipulating the trust money, on principle it seems that the *cestui* should have the option of a charge, or a trust of a proportionate part of the *res*. This view has some authority. *Greene v. Haskell*, 5 R. I., 447; *Bitser v. Bobo*, 39 Minn. 18, 38 N. W. 609. Cf. *Crawford v. Jones*, 163 Mo., 577, 63 S. W., 838. See 2 HARV. L. REV., 28; 19 HARV. L. REV., 511. The cases make no distinction between subsequent and prior creditors, such as is relied on in the principal case to vary the general rule.—*Harvard Law Review*.

VENDOR AND PURCHASER—REMEDIES OF VENDOR—ENFORCIABILITY OF IMPLIED LIEN WHEN STATUTE OF LIMITATIONS BARS DEBT.—A. conveyed land to B., taking a note for the price. The note remaining unpaid, A.'s representative instituted suit to enforce a vendor's implied lien. The Statute of Limitations had run on the note. *Held*, that the lien may not be enforced. *Shaylor v. Cloud*, 57 So., 666 (Fla.).

A vendor of real estate who conveys without stipulating for security has usually an implied equitable lien on the property conveyed to secure the purchase price. *Mackreth v. Symmons*, 15 Ves. Jr., 329; *Acton v. Waddington*, 46 N. J.

Eq., 16, 18 Atl., 356. *Contra, Ahrend v. Odiorne*, 118 Mass., 261. It may be enforced at any time when an action might be brought on the debt. *Graves v. Coutant*, 31 N. J. Eq., 763. Even if the debt is barred by some technical defence, as infancy or coverture, the lien is good. *Crampton v. Prince*, 83 Ala., 246, 3 So., 519. *Cf. Smith v. Henkel*, 81 Va., 524. See 2 WARVELLE, VENDORS, 2 ed., § 706. It has been held that the same is true of the Statute of Limitations, on the ground that the statute only bars the legal remedy and that the principle that a lien subsists after the debt is barred applies here. *Hood v. Hammond*, 128 Ala., 569, 30 So., 540; *Baltimore & Ohio R. Co. v. Trimble*, 51 Md., 99. Other courts argue that since the lien is but an incident of the debt it cannot survive its principal. *Borst v. Corey*, 15 N. Y., 505; *Waddell v. Carlock*, 41 Ark., 523. Where the seller retains title his security outlives the debt. *Evans v. Johnson*, 39 W. Va., 299, 19 S. E., 623; *Phillips v. Adams*, 78 Ala., 225. And where he conveys, expressly reserving a lien in the deed, courts have held likewise, regarding the transaction as an informal mortgage. *Hull's Admr. v. Hull's Heirs*, 35 W. Va., 155, 13 S. E. 49; *Coles v. Withers*, 33 Grat. (Va.), 186. *Contra, Chase v. Cartright*, 53 Ark., 358, 14 S. W., 90. But since equity has discretion in limiting equitable rights, it seems proper in the case of an implied lien, which is so closely connected with the legal debt, to apply the analogy of the legal Statute of Limitations, and the weight of authority supports this view. See 2 JONES, LIENS, § 1099; 2 WARVELLE, VENDORS, 2 ed., § 709. But see WOOD, LIMITATIONS, 3 ed., § 232.—*Harvard Law Review*.

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